

No. 1171

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E.
COTTON, Copartners Doing Business
Under the Firm Name and Style of COT-
TON BROTHERS AND COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

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TRANSCRIPT OF RECORD.

Upon Appeal from the United States District
Court for the District of
Hawaii.

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*In the District Court of the United States in and for the
District of Hawaii.*

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Busi-
ness Under the Firm Name and Style
of COTTON BROTHERS AND COM-
PANY,

Libelees.

Statement.

September 21st, 1903: Verified libel was filed and citation was issued to the United States Marshal for the District of Hawaii.

Names of the Original Parties to the Action.

Libelant: Mary K. Almy.

Libelee; E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company.

Dates of the Filing of the Pleadings.

September 21st, 1903: Libel.

October 2d, 1903: Answer of E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company.

Service of Process.

September 21st, 1903: Citation issued and delivered to the United States Marshal for the District of Hawaii.

Said citation afterward returned into court with the following return by the United States Marshal: "I have served this writ personally by copy on E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, the within-named defendants, by delivering to and leaving with A. S. Cantin, Esq., known to me to be their attorney in fact, a true copy thereof, to which was then and there attached a true copy of the libel in the above-entitled action on this 2st day of September, A. D. 1903."

May 19th, May 20th, May 23d and May 24th, 1904: The above-entitled cause was heard on said dates in the United States District Court for the Territory of Hawaii, at the city of Honolulu, before the Honorable Sanford B. Dole, Judge of said Court.

September 15th, 1904: Decision filed.

September 21st, 1904: A final decree in the above-entitled cause was filed and entered.

September 23d, 1904: Notice of appeal in the above-entitled cause was this day served and filed.

*In the District Court of the United States in and for the
District of Hawaii.*

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Busi-
ness Under the Firm Name and Style
of COTTON BROTHERS AND COM-
PANY,

Libelees.

Libel in Personam.

To the Honorable MORRIS M. ESTEE, Judge of the
District Court of the United States, in and for the
District of Hawaii.

The libel of Mary K. Almy of said District, against
E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners
doing business under the firm name and style of Cotton
Brothers and Company, in a cause of damages, civil and
maritime, alleges as follows:

First.—This libelant respectfully shows that she is
over 21 years of age; that she is a married woman; and
that she is a resident of said District. Libelant further
shows that during all the times herein mentioned, said
libelees above named, to wit, said E. J. Cotton, J. B.
Agassiz and C. E. Cotton were, and still are, copartners
under the firm name and style of Cotton Brothers and

Company, and doing business as such copartners in said District as bridge builders and general contractors and engineers and builders of all kinds of bridge work, pile-driving and wharves.

Second.—That during all the times herein mentioned, and up to the 4th day of August, 1903, hereinafter referred to, said libelant was the owner of a certain boat, vessel and water craft, commonly called a “House-boat,” used and capable of being used as a means of transportation on navigable waters; that said house-boat, during all of said times, was the sole and separate property of said libelant, free from the management, control, debts and obligations of libelant’s husband; that the value of said house-boat, during all of said times, and up to said August 4th, 1903, was the sum and amount of twenty-five hundred (\$2500) dollars, in lawful money of the United States; and that on the 1st day of January, A. D. 1903, the defendants and libelees above named did lease said house-boat from said libelant under and pursuant to the terms of that certain written lease, a true copy whereof is hereto attached, marked Exhibit “A,” and expressly made a part of this libel.

Third.—This libelant shows that the loss and damage hereinafter referred to were caused by, and received in consequence of a marine tort occurring within the admiralty jurisdiction of said Court; and in this behalf libelant shows that the facts and circumstances constituting said marine tort and the loss and damage caused thereby to this libelant occurred wholly and entirely

upon navigable waters within the jurisdiction of said Court.

Fourth.—This libelant further shows that at the time of the facts and circumstances constituting said loss and damage and said marine tort, said house-boat was wholly and entirely in the possession and under the control of the above-named libelees under and pursuant to the aforesaid lease; that neither said libelant nor any agent or representative of hers was, at said times, either in charge or aboard of said house-boat; and that neither said libelant nor any agent or representative of hers, directly or indirectly, participated in said facts and circumstances constituting said marine tort, and that said libelant was wholly ignorant of said loss and damage until after the same had occurred and accrued.

Fifth.—This libelant further shows that on August 4th, 1903, within the jurisdiction of said Court to wit, upon navigable waters near the harbor and port of Honolulu, in the Island of Oahu, in the Territory and District of Hawaii, while said house-boat was in the sole and exclusive possession and control of said libelees under and pursuant to said lease, by, through and in direct and immediate consequence of the carelessness and negligence of said libelees and defendants, and without any fault, carelessness or negligence upon the part of this libelant, said house-boat became and was wrecked in and upon said navigable waters within said jurisdiction, and became and was and is now a total loss; and in this behalf, this libelant now avers and sets forth

the fact constituting said carelessness and negligence of said defendants and libelees as follows, to wit:

Prior to said August 4th, 1903, said defendants and libelees, in whose sole and exclusive possession and control said house-boat then was, had moored said house-boat near the western shore of the entrance to Pearl Harbor, in said Island of Oahu; and on said August 4th, 1903, said defendants and libelees proceeded to remove said house-boat from said Pearl Harbor to the harbor of Honolulu, in said Island of Oahu. Said transportation was then and there attempted to be performed by said defendants and libelees by towing said house-boat in tow of the steam tug "Kaena," then and there operated and controlled by said defendants and said libelees. Libelant further shows that at said time and place, and along with said house-boat, said defendants and libelees undertook to transport by towing in tow of said "Kaena," from said Pearl Harbor to said Honolulu harbor, and as part and parcel of the same tow of which said house-boat formed a part, two laden scows. It was then and there the duty of said defendants and libelees, in making up said tow, to see that it was then and there properly constructed, but this duty said defendants and libelees, by reason of the aforesaid carelessness and negligence, wholly failed and neglected to perform; and in this behalf, this libelant shows that said tow was constructed in tandem, and was then and there so constructed that said house-boat was placed between said tug "Kaena" and said two laden scows hereinabove referred to. Libelant further shows that

when said tandem tow was constructed, said tug proceeded from said Pearl Harbor to said Honolulu harbor. At this time a fresh breeze was blowing, the wind being about N. E. by E., a fairly heavy sea was running, and there was a substantial swell. Libelant shows that when said tug and tow had reached a point about one-half mile west of Kalihi entrance, said house-boat, by reason of the aforesaid carelessness and negligence of defendants and libelees, capsized and sank, and became a wreck and total loss; and in this behalf, this libelant shows that the superstructure of said house-boat contained two stories, with three rooms in the lower story and two rooms and a lanai in the upper story, and that when, as alleged, said house-boat capsized and sank and became wrecked, said entire superstructure, by reason thereof and in direct consequence of said capsizing, sinking and wreck, became detached and broken away from said house-boat, thereby utterly ruining and destroying said house-boat and rendering it wholly useless and valueless for the uses and purposes for which it was intended and held. And in this behalf, libelant shows that said loss and damage were then and there immediately, directly and proximately caused by the carelessness and negligence of said defendants and libelees; and in particular by the careless and negligent manner and method in which the aforesaid tug and tow were then and there operated by said defendants and libelees; and in particular by the careless and negligent manner in which said tow was constructed and made up by said defendants and libelees; and in par-

ticular by the careless and negligent selection by said defendants and libelees of the time at which said towage was attempted, having regard to the conditions of wind and sea then prevailing; and in particular by the careless and negligent attempt of said defendants and libelees to tow too much upon the occasion hereinabove alleged.

Sixth.—This libelant further shows that by reason of the premises, and by reason of the aforesaid carelessness and negligence, said house-boat became and was wrecked as above alleged, and became and was and is now a total loss; whereby, and by reason of all the premises, this libelant has suffered and sustained loss and damage in the sum and amount of two thousand five hundred (\$2,500) dollars in lawful money of the United States.

Seventh.—That said loss and damage received and sustained by said libelant, as aforesaid, were occasioned, caused and brought about wholly by reason of the carelessness and negligence of said defendants and libelees, and without any fault, want of care, or negligence on the part of said libelant; and that all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore, said libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue herein against the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business

under the firm name and style of Cotton Brothers and Company; and that they may be required to answer upon oath this libel and all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, together with costs; and this libelant may have such other and further relief as in law and justice she may be entitled to receive.

MARY K. ALMY,
Libelant.

A. S. HUMPHREYS and
J. J. DUNNE,
Proctors for said Libelant.

United States of America, }
District of Hawaii. } ss.

Mary K. Almy, the libelant named in the foregoing libel, being first duly sworn, deposes and says that she is the libelant named in the foregoing libel and that she has heard read said libel; that she knows the contents thereof; that said libel is true as to all matters therein stated as of her own knowledge; and that as to the matters therein stated upon information or belief, she believes it to be true.

MARY K. ALMY.

Subscribed and sworn to before me this 21st day of September, A. D. 1903.

[Seal] CLARE F. WEBSTER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Exhibit "A."

This indenture of lease made this first day of January, A. D. 1903, by and between Mary K. Almy, of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated as the lessor of the first part, and Cotton Brothers and Company, a firm doing business at Honolulu aforesaid, hereinafter designated as the lessees of the second part,

Witnesseth: That said lessor, for and in consideration of the agreements and covenants on the part of said lessees hereinbelow mentioned, does hereby demise and lease unto said lessees that certain two-story house-boat now lying at Pearl Harbor, Oahu, together with all furniture therein contained as per inventory hereto attached and made a part hereof.

To have and to hold the same unto said lessees, their heirs, successors or assigns, for the term of six (6) months from the first day of January, A. D. 1903, with the privilege of and extension thereof from month to month, said extension not to exceed three months.

Yielding and paying therefor rent at the rate of seventy-five dollars (\$75.00) per month.

And said lessor hereby covenants with said lessees, their heirs, successors and assigns, that they shall peaceably hold and enjoy said house-boat and furniture as aforesaid.

And said lessees, for themselves and their heirs, successors and assigns, hereby covenant with said lessor, her heirs, representatives and assigns, that they and their legal representatives will pay the said rent in man-

ner aforesaid; that they will not remove said house-boat from the limits of Pearl Harbor, Oahu; that they will provide proper moorings and shall be liable for all damages to said house-boat from stranding or wreck; that in case of total loss of the house-boat that the lessees will pay unto the lessors the sum of \$2500.00, and that at the end of said term or sooner termination thereof they will return the same in good order and condition, ordinary wear and tear excepted. Lessees shall not be liable for any damage by fire.

And it is hereby agreed between the parties hereto that if any rents shall be due and unpaid, or if default shall be made in any of the covenants hereinbefore contained, then it shall be lawful for said lessor, her heirs, legal representatives or assigns, to take possession of the said house-boat and furniture and expel and remove said lessees and all persons claiming by, through or under them therefrom.

In witness whereof said parties have hereunto set their hands and seals to this and to another instrument of like tenor and date on the day and year first above written.

MARY K. ALMY,
COTTON BROS. & CO.

A. S. CANTIN,
Witness.

[Endorsed]: Title of Court and Cause. Libel in Personam. Filed Sept. 21, 1903. W. B. Maling, Clerk.

No. 39.

UNITED STATES OF AMERICA.

*District Court of the United States, for the Territory of
Hawaii.*

Libelant's Bond for Costs.

Whereas, a libel was filed in this court on the 21st day of September, in the year of our Lord one thousand nine hundred and three, by Mary K. Almy against E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners under firm name, Cotton Brothers and Company, for reasons and causes in the said libel mentioned, and the said Mary K. Almy and James D. McInerny, her surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said Mary K. Almy or her surety, execution may issue against their goods, chattels and lands for the sum of two hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of two hundred dollars conditioned the libelant above named shall pay all costs and charges that may be awarded against her in any decree by this Court, or, in case of appeal, by the Appellate Court.

MARY K. ALMY.

JAMES D. McINERNY.

Taken and acknowledged this 21st day of September, 1903, before me,

[Seal]

W. B. MALING,
Clerk.

Territory of Hawaii—ss.

James D. McInerny, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of five hundred dollars, over and above all his debts and liabilities, and that his property is situate in said Territory and subject to execution.

JAMES D. McINERNY.

Sworn to this 21st day of September, 1903, before me,

[Seal]

W. B. MALING,
Clerk.

Filed the 21st day of September, 1903. W. B. Maling,
Clerk.

UNITED STATES OF AMERICA.

In the District Court of the United States, for the Territory of Hawaii.

Citation.

The President of the United States of America, to the Marshal of the United States of America, for the Territory of Hawaii, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Territory of Hawaii, on the 21st day of September, A. D. 1903—

By Mary K. Almy, Libelant, vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in a certain action for damages, civil and maritime, to recover the sum of \$2500.00 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant Mary K. Almy, and praying that a citation may issue against the said respondents, pursuant to the rules and practice of this Court: Now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents, if they shall be found in your District, that they be and appear before the said District Court, on Friday, the 2d day of October, A. D. 1903, at the courtroom in the city of Honolulu, then and there to answer the said libel, and to make their allegations in that behalf: and have you then and there this writ, with your return thereon.

Witness the Honorable MORRIS M. ESTEE, Judge of said Court, at the city of Honolulu, in the Territory of Hawaii, this 21st day of September, A. D. 1903, and of the independence of the United States the one hundred and twenty-eighth.

[Seal]

W. B. MALING,
Clerk.

A. S. HUMPHREYS and
J. J. DUNNE,

Proctors.

Marshal's Return.

I have served this writ personally by copy on E. J. Cotton, J. B. Agassiz, and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, the within named defendants, by delivering to and leaving with A. S. Cantin, Esq., known to me to be their attorney in fact, a true copy thereof, to which was then and there attached a true copy of the libel in the above-entitled action, on this 21st day of September, A. D. 1903.

E. R. HENDRY,
United States Marshal.

[Endorsed]: Title of Court and Cause. Filed September 21st, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

No. 39.

UNITED STATES OF AMERICA.

*District Court of the United States, for the Territory of
Hawaii.*

Libelees' Bond for Costs.

Whereas, a libel was filed in this court on the 21st day of September, in the year of our Lord one thousand nine hundred and three, by Mary K. Almy vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, for reasons and causes in the said libel mentioned, and the said Cotton Brothers and Company and

John Ouderkirk, and John Emmeluth, its sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said Cotton Brothers and Company or its sureties, execution may issue against their goods, chattels and lands for the sum of two hundred dollars:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the undersigned shall be, and each of them is, bound in the above-named sum of two hundred dollars, conditioned the libelees shall pay all costs and charges that may be awarded against them in any decree by this Court, or, in case of appeal, by the Appellate Court.

COTTON BROS. & CO.

Per A. S. CANTIN,
Attorney in Fact.

JOHN OUDERKIRK.

JOHN EMMELUTH.

Taken and acknowledged this 2d day of October, 1903,
before me,

[Seal]

FRANK L. HATCH,
Deputy Clerk, United States District Court, Territory
of Hawaii.

Territory of Hawaii—ss.

John Ouderkirk and John Emmeluth, parties to the above stipulation, being duly sworn, do depose and say, each for himself that he is a resident freeholder in said Territory; that he is worth the sum of five hundred dollars, over and above all his debts and liabilities; and

that his property is situate in said Territory and subject to execution.

JOHN OUDERKIRK.

JOHN EMMELUTH.

Sworn to this 2d day of October, 1903, before me,

[Seal]

FRANK L. HATCH,

Deputy Clerk.

Filed the 2d day of October, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Appearance of Counsel for Libelees.

Sir:

You will please to enter our appearance as proctors for the defendants in this cause.

October 2, 1903.

A. L. C. ATKINSON and

R. W. BRECKONS,

Proctors.

To Walter B. Maling, Esq., Clerk.

[Endorsed]. Title of Court and Cause. Filed October 2d, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Answer.

To the Honorable MORRIS M. ESTEE, Judge of the District Court of the United States for the Territory of Hawaii:

Come now E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, and for answer to the libel and complaint of Mary K. Almy against the said Cotton Brothers and Company, propound as follows:

First.—They admit each and every allegation in the first article of said libel contained.

Second.—That the allegations set forth in the second, third, fourth, fifth, sixth and seventh articles of said libel are in great part untrue and that the truth as to the matters therein stated is as follows:

That during all of the times mentioned in said libel, and up to the 4th day of August, A. D. 1903, the said libelant was the owner of a certain boat, commonly called a "House-boat," used and capable of being used as a means of transportation on navigable waters; that during all of said times, the husband of the said libelant was in control and charge of said boat, and acting as the agent of the said libelant in and concerning the same; that the value of the said house-boat during all of the said times, and up to the 4th day of August, A. D. 1903, was the sum and amount of fifteen hundred dollars (\$1500.00), that on the first day of January, A. D. 1903, the defendants and libelees herein did lease said house-boat from libelant, under and pursuant to the terms of the written lease, of which a true copy is attached to said libel; that at the time said lease was entered into; and under and by virtue of the terms thereof, the said house-boat was delivered by the said libelant, through her said husband, to the said libelees, at Pearl Harbor, situated some ten miles distant from the said Honolulu; that under and pursuant to the terms of said lease, it became the duty of the libelees, at the termination thereof, to redeliver to said libelant said house-boat, at said Pearl Harbor; that said lease was, in accordance with the terms thereof, terminated on the 29th day of July, A. D. 1903; that said libelant was notified

of the termination of said lease; and that she, the said libelant, might take possession of said boat; that at no time subsequent to the said 29th day of July, A. D. 1903, was said house-boat in the possession of the said libelees, under or by virtue of said lease and at no time after said 29th day of July, A. D. 1903, were the said libelees, or either of them, in the sole possession or control of said house-boat, under or pursuant to the terms of said lease; that at the termination of the lease aforesaid, as hereinbefore set forth, the said libelant requested the said libelees to remove said house-boat from Pearl Harbor to the port of Honolulu, for the convenience of said libelant; that thereupon, and solely as a favor to and for the convenience of said libelant, said libelees agreed to so remove said boat, under the express stipulation and agreement, however, that the said libelees would in no manner be responsible for any loss or damage to said house-boat which might occur while said boat was being moved to said port of Honolulu; that under and pursuant to said request of said libelant and under said stipulation and agreement so entered into said libelees did, on the 4th day of August, A. D. 1903, proceed to remove said house-boat from said Pearl Harbor to the Harbor of Honolulu, in said Island of Oahu. That said removal, under and pursuant to said request and under said stipulation and agreement so entered into, was attempted to be performed by said libelees by towing said house-boat in tow of the steam tug "Kaena" then and there operated and controlled by these libelees; that at said time and place, and along with said house-boat,

said libelees undertook to transport by towing in tow of said "Kaena" from said Pearl Harbor to said Honolulu Harbor, and as part and parcel of the same tow of which said house-boat formed a part, two laden scows; that said tow was constructed in a proper and seaman-like manner, and that in constructing the same in said manner said libelees exercised due care in the premises, and were guilty of neither carelessness nor negligence in relation thereto; that when said tow was so constructed, said tug proceeded from said Pearl Harbor to said Honolulu harbor; that at this time a light breeze was blowing, the sea was smooth, and there was no appreciable swell; that when said tug and tow had reached a point about one half mile west of Kalihi entrance, the said house-boat, without any carelessness or negligence on the part of these libelees, suddenly went over on one side; that thereupon said libelees towed the said house-boat into water where said house-boat could be anchored, and anchored said house-boat, and proceeded with said tug to Honolulu, with the persons who had been on board of the said house-boat, and with the said laden scows; that after the arrival of the said tug and the said laden scows at Honolulu harbor, the said tug proceeded back to the spot where the said house-boat had been anchored, and started to tow the said house-boat into the harbor of Honolulu; that said house-boat was brought to said harbor, and a watchman was left in charge by said libelees; that said house-boat turned over; that the turning over of said house-boat was not due in any manner to the carelessness or negligence of

the said libelees, but was, as libelees are informed and believe, and so charge the fact to be, due to the fact that the said boat was not properly built into the scow, but when originally constructed, was simply tacked to said scow with tenpenny nails, which became gradually loosened from the rocking of the scow.

And libelees further show in this behalf that the said house-boat is not now a total loss, and that said libelant has not suffered or sustained loss or damage in the sum or amount of two thousand five hundred dollars (\$2,500.00), as alleged in said libel.

Third.—That all and singular the premises are true, in verification thereof, if denied, said libelees crave leave to refer to the depositions and other proofs to be exhibited by them in this cause.

Wherefore, said libelees pray that this Honorable Court will be pleased to pronounce against the libel aforesaid, and to condemn the libelant in costs, and otherwise right and justice to administer in the premises.

E. J. COTTON,

J. B. AGASSIZ,

C. E. COTTON,

Copartners Doing Business Under the Firm Name and
Style of COTTON BROTHERS & COMPANY.

By their Attorney in Fact,

A. S. CANTIN.

A. L. C. ATKINSON and

R. W. BRECKONS,

Proctors.

United States of America, }
Territory of Hawaii. } ss.

A. S. Cantin, being first duly sworn according to law, deposes and says that he is the attorney in fact and agent of the libelees, E. C. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, and that each of the members of the said copartnership are at present in the State of California; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true; that he is acquainted with the facts set forth in said answer from the fact that he has been in charge of the business of said libelees in Honolulu for six months last past; the reason that this affidavit is made by deponent is that none of the libelees are within this district or within one hundred miles of Honolulu; deponent's means of information are letters from said libelees.

A. S. CANTIN.

Subscribed and sworn to before me this 2d day of October, A. D. 1903.

[Seal]

FRANK L. HATCH,

Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Title of Court and Cause. Filed October 2d, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, Vol. 2, Page 477,
Friday, October 2, 1903.

[Title of Court and Cause.]

Order Passing Case.

This being the return day herein, by order of the Court, the Marshal made due proclamation according to law, and thereupon, on motion of R. W. Breckons, Esq., of proctors for the libelees, and by consent of proctors for the libelant, it is ordered that this case be passed for the purpose of taking depositions.

From Minutes U. S. District Court, Vol. 3, Page 36, Monday, May 9, 1904.

[Title of Court and Cause.]

Order Setting Time of Trial.

Upon motion of Mr. J. J. Dunne, of proctors for the libelants, it is ordered that this cause be set for trial on Thursday, May 19, 1904, at 10 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 49,
Thursday, May 19, 1904.

[Title of Court and Cause.]

Trial.

This cause came on regularly this day for trial, counsel for both sides being present in open court. It was ordered by the Court, both sides consenting thereto,

that if a transcript of the testimony in this cause is required, the cost of said transcript shall be taxed as a cost to be paid by the losing party. And thereupon the trial is proceeded with the introduction of evidence on behalf of the libelant. And thereupon on motion of the libelees it is ordered that the further hearing of this cause be continued until Friday morning, May 20th, 1904, at 10 o'clock. And it was further ordered that all persons subpoenaed to be present in this case to-day shall appear in court at said hour and date.

From Minutes U. S. District Court, Vol. 3, Page 50, Friday, May 20, 1904.

[Title of Court and Cause.]

Order Continuing Trial.

Now, on this day, it was ordered by the Court that the further trial of this cause be had on Monday, May 23d, 1904, at 10 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 54, Monday, May 23, 1904.

[Title of Court and Cause.]

Trial (Continued).

This cause came on regularly this day for continued trial, proctors for both sides being present in open court, and thereupon the trial is proceeded with by the introduction of evidence. And the hour for adjourn-

ment having arrived, the further trial of this cause is continued until Tuesday, May 24, 1904, at 9:30 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 55, Tuesday, May 24, 1904.

[Title of Court and Cause.]

Trial (Continued).

This cause came on regularly this day for continued trial, proctors for both sides being present in open court, and thereupon the trial is proceeded with by the introduction of further evidence, at the conclusion of which the case is submitted to the Court without argument, each side to have two weeks' time within which to file briefs. And it is further ordered that the reporter transcribe the testimony herein and file it; the cost of such transcript to be taxed as a cost against the losing side.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

COTTON BROTHERS & COMPANY
(a Corporation),

Libelee.

No. 39.

Testimony.

Appearances:

For Libelant, Messrs. J. J. DUNNE and A. S. HUMPHREYS.

For Libelee, Messrs. A. F. JUDD and R. W. BRECKONS.

GEO. P. THIELEN, Reporter.

Thursday, May 19th, 1904.

Morning Session.

Mr. DUNNE.—By consent, I will offer in evidence the lease in this case and ask that it be marked Libelant's Exhibit No. 1.

Mr. ALLAN DUNN, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. I will ask you, Mr. Dunn, where you reside?

(Testimony of Allan Dunn.)

A. In Honolulu, Island of Oahu.

Q. How long have you been living here?

A. Six years next April.

Q. I will ask you if you know Pearl Harbor, on this island? A. I do.

Q. And I will ask you further if you know, if you knew, the house-boat which formerly belonged to Mrs. Almy? A. I do.

Q. Now, on August 4th, 1903, where were you?

A. I was in Pearl Harbor, on board the yacht "Glayds."

Q. Who, if anyone, was with you?

A. T. W. Hobron.

Q. On that day how long did you remain, if at all, in Pearl Harbor?

A. I remained in Pearl Harbor until approximately half-past four that afternoon. We started to sail out—I probably left Pearl Harbor at five or a few minutes after.

Q. When you say you started to sail out, what do you mean by that?

A. I mean I was anchored about a mile from the bar, near the place called the "shark pen" and marked on the map of Pearl Harbor as that; that at about half-past four we pulled up the anchor we had aboard the yacht, hoisted sail and started to sail out of the harbor.

Q. Where was the yacht "Glayds" bound to at that time? A. Honolulu.

(Testimony of Allan Dunn.)

Q. After you made sail and proceeded towards Honolulu, what, if anything, did you see?

A. We saw towards Honolulu and slightly to seaward, about a mile to sea and possibly a mile towards Honolulu—possibly a mile and a half in a direct line of sailing, a tug, having in tow a large object and back of that two smaller objects.

Q. I will ask you if at that time you were able to recognize that tug?

A. We recognized the tug in this manner: we knew that the "Kaena" was the only tug in that neighborhood, and although we couldn't swear it was the "Kaena," it was our natural surmise that that was the tug.

Q. Well, later on did you get closer to it?

A. Later on I got very close to the tug and could identify it as the "Kaena."

Q. You said she was towing something. What was it the "Kaena" was towing?

A. Of course at this time she was a mile and a half away and we could only surmise. We surmised it was the house-boat belonging to Mrs. Almy. Later in we knew it was the house-boat.

Q. And identified it as such?

A. We identified it.

Q. Will you describe how that tow was made up?

A. First came the steamer "Kaena," next came cabled, from my point of view, quite a little distance of course, sea-line and sky-line between, this large object,

(Testimony of Allan Dunn.)

and behind that, two smaller objects, apparently scows loaded down probably with something that kept them not very high above the water-line.

Q. Well, what were the relative positions of the tow-boat, the house-boat and the scows?

A. First tow-boat, then the house-boat and then the scows.

Q. So that the position of the house-boat was intermediate between the tug and the scows?

A. Intermediate; between them.

Q. Is there any technical term to describe a tow of that kind?

A. Well, I don't know what you would call technical; the term is "tandem" tow.

Q. Is there any difference between a tandem tow and a spike tow, if you knew?

A. Yes; a spike tow, I suppose, requires the same arrangement as a spike team does; that is, a spike team would be where one object is placed in front and two lines lead diagonally back in different directions to the two objects behind; whereas, a tandem tow or a tandem team in my explanation would be first one object, then the next directly behind that, and the next directly behind that.

Q. And that was the kind of tow this was?

A. Yes, sir.

Q. Will you describe the conditions of wind and weather and sea at that time?

A. There was a good fresh breeze blowing at the

(Testimony of Allan Dunn.)

time. There had been from two o'clock that afternoon, which lasted well on to sunset. The breeze was sufficient to keep the "Glays," which was going along with her lee rail in the water, in sight of the object which we had seen. I should say that part of the time it was quite a stiff breeze. We were close-hauled. The seas were, well, I suppose what a man who goes to sea would call a moderate sea. It had a heavy swell on which would make a person not used to going to sea good and seasick.

Q. I will ask you, what, if anything, there was between the tug and the house-boat?

A. A big rope cable.

Q. I will ask you how you know there was a big rope between the tug and the house-boat?

A. Because we were sailing considerably faster than the "Kaeana." We were tacking for Honolulu and got in close enough to see it; as the tug would go up and down on the waves—the waves were sufficiently large for that, quite heavy swells—the cable between the tug and the house-boat would tauten out and you could see the water it would bring up with it fall off of it.

Q. Now, do you know where the Kalihi entrance is?

A. I do.

Q. When you about abreast of that, I wish you would describe what you saw and what happened?

A. A little before we were abreast of that we noticed that the tug was close in, that is, closer in toward the reef than we imagined. We wondered how she had got-

(Testimony of Allan Dunn.)

ten in so close. She made a straight line originally for Honolulu, and on that line I should say she could not round the bell buoy. Then we saw that object over her, apparently the scow, on top of it a dark triangular object, which looked to us as if the house-boat was in trouble and was sliding off or being beaten off the top of the scow.

Q. What did you do?

A. At that time we could see that the steamer was standing off and on around this spot. We immediately came to and sailed up to it. It was not quite dark at this time and as we sailed up the tug left, stood out to sea and then started off on her course to the bell buoy.

Q. Towards Honolulu?

A. Towards Honolulu. The house-boat was well in towards the reef at this time and the tug had to stand out to sea to get its course to go around the bell buoy. We sailed up within eight or ten feet of the house-boat, what was left of it.

Q. What did you see?

A. We saw that the scow part of it was low in the water; that, I should say, less than one-half of the upper structure, the house structure, was left on top of the scow.

Q. Where was the other part?

A. The other part was in the water. The house was then breaking up. The wall which was still on the scow was leaning over very badly; it was curved. It was evidently pulling to pieces. It was quite close in towards

(Testimony of Allan Dunn.)

the reef; and after we had stayed there a little while we started on to Honolulu, keeping in close before tacking out. As we sailed we could see more and more of this superstructure sliding off. The waves, which close in towards the reef are very much heavier, were breaking over the top of the scow.

Q. How about the wind at that place?

A. The wind was slightly lessened at that time. Sailing from Pearl Harbor to Honolulu any wind at sunset, when the wind is in such direction, you would naturally get into a bald patch, a calm sea. I have very often been fishing out there just about then. What wind there would be offshore and what waves there were would be such as to set the house-boat towards the reef. She was anchored.

Q. What was the condition of the light at that time?

A. The light was sufficiently good to see everything on shore; all the houses. The lights were not up in the "Kaena" at that time. She put them out a little later.

Q. Did you have your lights on the "Glayds" up at that time?

A. We didn't put out our lights until afterwards.

Q. What did you do then after seeing this condition of things at Kalihi entrance? What became of the "Glayds"?

A. We sailed on, followed the "Kaena" around the bell buoy into the main channel. We were about—well, in time, about ten minutes behind. That is to say, she

(Testimony of Allan Dunn.)

passed the last buoy about ten minutes before the "Glaysds."

Q. What time was it when the "Glaysds" and "Kaena" got into Honolulu harbor?

A. That is a long time ago to say exactly, but about eight o'clock.

Q. Well, after that, what became of the "Glaysds"?

A. We anchored.

Q. What became of the "Kaena"?

A. The "Kaena"? We saw her leave the harbor about an hour later.

Q. And did you notice in which direction she went?

A. She went out to sea and later came back with what was left of the scow.

Q. Did you see what was left of the scow when she came back? A. I saw it the next morning.

Q. Will you describe its condition then?

A. When I saw her the next morning, the scow was lying up against one side, I think, of Bishop wharf. There was nothing left on it but some badly smashed up lumber, light lumber, a few planks. I think, if I remember right, there was one little post sticking up in one corner. It was as if you had loaded a dozen or more pieces of broken planking on it. There was no house or sign of a house.

Q. The whole superstructure was gone?

A. Was gone entirely. Just debris left.

Q. I will ask you if you have had occasion to visit

(Testimony of Allan Dunn.)

Pearl Harbor as a yachtsman in the past five or six years? A. A great many times.

Q. About how often? Give some estimate.

A. Oh, at least one hundred times.

Q. I will ask you if you have made any observation as to the conditions of wind, weather and sea between here and Pearl Harbor at different periods of the day?

A. I have, during the day and at night, too.

Q. Is there any difference in the action of the wind between here and Pearl Harbor at different periods?

A. At what time of the year?

Q. August, the early part of August?

A. When we sailed up to Honolulu in August at that time of day and at that time of night it was decidedly calmer from twelve to five in the morning than at any other time of the day; twelve midnight I mean; under ordinary conditions, when there is no gale blowing.

Q. Well, there was a gale blowing on this occasion?

A. No.

Cross-examination.

By Mr. BRECKONS.—You have testified, Mr. Dunn, in reference to the way that tow was constructed. Where was the “Glays” situated with reference to the tow when you made these observations concerning which you have testified?

A. West of her, three-quarters of a mile.

Q. And what time of the day was it?

(Testimony of Allan Dunn.)

A. I can only speak approximately. Approximately it was a quarter of six, something like that.

Q. And could you give approximately how near it was to the entrance of Kalihi harbor at that time?

A. In mileage?

Q. No, with reference to the distance between Pearl Harbor entrance and Honolulu harbor entrance?

A. About half way.

That is all.

Mr. THOMAS HUGHES, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Hughes, what is your occupation?

A. Master car repairer, Oahu Railway.

Q. How long have you been engaged in that business? A. About fifteen years in this country.

Q. And I will ask you if you have any other occupation in the way of builder?

A. Yes, I have built tow-thirds of the lighters in use on these Islands—a great many of them.

Q. And have you been constructing these lighters during these fifteen years you speak of, from time to time? When did you commence building lighters?

A. About thirty years ago.

Q. And work of that character is the type of work that you have devoted your life to—building?

(Testimony of Thomas Hughes.)

A. Except the last fifteen—with the exception of about seventeen years.

Q. I will ask you if you knew Mrs. Almy's house-boat?

A. Yes, sir.

Q. How did you know that, Mr. Hughes?

A. I built it.

Q. When did you build it?

A. I don't remember just when I built it.

Q. About how long ago, as near as your memory will permit?

A. I have been so much at that kind of work in latter years I can't recollect the exact time I built it.

Q. Now, did you see anything, any portion, of that house-boat after the 4th of August, 1903?

A. I saw part of the house-boat, the hull, after the day mentioned.

Q. Where did you see it?

A. I saw it alongside the wharf.

Q. Where? A. I think at Bishop's wharf.

Q. In what port? A. Honolulu.

Q. Will you describe what you saw at that time?

A. I saw the hull; that was the only portion of it that I saw.

Q. What was the condition of the hull at that time?

A. Well, the hull was in, I should say, a pretty good condition. The hull, there were several inches of water in the bottom.

Q. Now, having built the boat and having seen her after the 4th day of August, I will ask you what it would

(Testimony of Thomas Hughes.)

cost to put that boat back in the same condition in which she was prior to the accident?

A. Well, I wouldn't undertake to put her in the same condition for less than two thousand dollars.

Q. Well, what was her value originally, if you know?

A. I don't know the exact amount. I don't know the total cost of the boat and house. The cost of the scow was seven hundred dollars, the scow alone.

Cross-examination.

(By Mr. BRECKONS.)

Q. Mr. Hughes, by putting her back in the same condition, you mean by that it would cost that much to put the superstructure on and then it would be entirely new?

A. What I mean to say is that I wouldn't undertake to contract to build the superstructure.

Q. But by the use, by the expenditure of two thousand dollars a superstructure as put on there would of course be new and would leave the boat practically new—is that what you mean? I will ask you if you would put her in as good a condition as the day before she was wrecked?

A. She would not be in as good a condition, because naturally the hull deteriorates a little in the course of time, but, independent of that, the deterioration of the hull, why I wouldn't, if I was asked to figure on putting that superstructure on the same as originally, I wouldn't undertake to do it for less than that amount of money.

Q. So what you mean is that for two thousand dol-

(Testimony of Thomas Hughes.)

lars you could put her in as good condition as originally constructed? A. No, sir.

Q. Except the hull?

A. Except deterioration to the hull; yes.

Q. Do you know about how many years ago it was built?

A. Well, it was only built a short time before it went down to Pearl Harbor.

Q. For whom did you build it?

A. For Mr. Almy.

Q. The gentleman sitting here? A. Yes.

Q. It was paid for by him, was it?

A. Yes, sir.

That is all.

H. N. ALMY, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Almy, do you know the house-boat involved in this controversy? A. I do.

Q. When was that house-boat built?

A. She was built in the middle of July, 1902.

Q. What was the cost of building that house-boat?

A. The boat as built before she went to Pearl Harbor cost something over twenty-two hundred dollars, twenty-two hundred and fifty dollars, and the fitting her up for Cotton Brothers work before being towed down there, putting in bunks and everything, for the forty

(Testimony of H. N. Almy.)

men, and other incidentals, cost a little less than three hundred dollars, a total cost of work, fitted up for their work before taking to Pearl Harbor from Honolulu was twenty-five hundred and fifty dollars, about, within a few dollars.

No cross-examination.

(The trial of the cause was here continued, being again taken up on Monday, the 23d day of May, 1904.)

Monday, May 23d, 1904.

Morning Session.

Mr. ALLAN DUNN, recalled.

Direct Examination.

(By Mr. DUNNE.)

Q. I will ask you, Mr. Dunn, if you were ever on board the house-boat involved in this case? A. I was.

Q. I will ask you if you know whether there were air courses in that house-boat?

A. You mean below the superstructure?

Q. Below the superstructure? A. There were.

Q. Where were those air courses?

A. Immediately below that platform on that model (pointing to the model in the courtroom).

Q. In here. (Referring to model.)

A. Running in there.

Q. How far did they extend athwart-ships, crosswise, if you know?

(Testimony of Allan Dunn.)

A. I couldn't say exactly how far they went. As far as I recollect they went nearly across.

Q. Do you know what their width was?

A. Two or three inches, I should say.

Q. Were there any bitts on the scow of this house-boat?

A. Four bitts.

Q. How were they situated?

A. One on each corner.

Q. On each of the four corners?

A. Yes, sir.

That is all.

The COURT.—Mr. Dunn, I don't understand these air courses you speak of.

A. Why, your Honor, between the scow proper and the platform of which the superstructure is situated there was a space in which the fore and aft part of the scow did not come immediately up to the platform but left a space running through the length through which air could pass and of course through which water might pass, as far as that goes.

The COURT.—That was open to the outside?

A. That was open to the outside, yes.

Cross-examination.

(By Mr. BRECKONS.)

Q. How many times have you seen that house-boat?

A. Seen it?

Q. Yes, been on it?

A. I was on it the whole of one day—about four times, I think, altogether.

That is all.

C. NIELSEN, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What initials have you? A. C. Nielsen.

Q. What is your occupation?

A. I have been on the sea all my lifetime.

Q. How old a man are you, Captain? A. Sir?

Q. How old are you? A. I am fifty-six.

Q. I will ask you if you are a certificated officer?

A. Yes.

Q. In what class of vessels? A. Steamers.

Q. Have you your certificate with you?

A. No, sir.

Q. Is your certificate still in force? A. Yes, sir.

Q. From the inspectors of what district did you receive your certificate?

A. Right here in Honolulu.

Q. Have you had any experience as a tow-boat man?

A. Yes, off and on.

Q. I will ask you if you know the steam tug "Kaena"

A. Yes, sir; I know her well.

Q. Did you have any experience in her?

A. For six years, more or less; I was the master of her for six years.

Q. You were the master of her for six years?

A. Yes.

Q. Have you had any experience in tow-boating in other vessels than the "Kaena"?

(Testimony of C. Nielsen.)

A. I have towed vessels with the steamer "Cummins" when I was master of her.

Q. How many years of your nautical experience have you been engaged in steam vessels, Captain?

A. Sir?

Q. (Question repeated.)

A. Well, I was master of the "Kaena" six years and the "Cummins" over ten years; and every now and then I did some towing. It was not a regular tow-boat but we did considerable towing at times.

Q. I was going to ask you, Captain, for your opinion on a state of facts which I will try to state to you. I want you to assume that a tow-boat, the "Kaena," starts from Pearl Harbor for Honolulu to tow up three vessels. One of these vessels is a house-boat, the other two vessels are laden scows. When the tow is made up, the house-boat is placed between the tug and the two scows in tandem—and I ask you if, in your opinion, that tow was properly, seemingly made up, assuming those to be the facts?

A. Well, those scows, how big were they? Were they as big and heavy as the house-boat?

Q. I will assume that they are at least as large as the house-boat.

Mr. BRECKONS.—This is now objected to, if your Honor please, because it is based on a state of facts not established by the evidence.

Mr. DUNNE.—I will withdraw that for a moment, Captain. Will you step down, please?

Mr. FREDERICK ROUSE, being first duly sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your occupation, Captain?

A. Master mariner.

Q. How long have you been going to sea?

A. About twenty-eight years.

Q. Where did you go to sea, Captain?

A. I began at St. Johns, New Brunswick.

Q. Have you ever sailed in the United States Navy?

A. Yes, I have, through the Spanish-American war.

Q. With what record? A. Lieutenant.

Q. I will ask you if you are a certificated master in steamers? A. Yes, sir.

Q. And is your certificate in force at present?

A. Yes, sir.

Q. Have you had any experience in tow-boating?

A. About three years.

Q. Where?

A. Out of Boston, New York, Galveston and New Orleans.

Q. Now, I will ask you if you know the house-boat involved in this case? Have you seen the house-boat?

A. Oh, yes.

Q. Do you know the scows that were used down there at the dredging station at Pearl Harbor, the Cotton Brothers' scows?

A. Yes, I have seen them quite often.

(Testimony of Frederick Rouse.)

Q. I will ask you now to state from your knowledge of those scows—Oh, by the way, did you see the “Kaena” on the night she came in from the accident?

A. No, I didn't.

Q. On the morning following this accident did you see the scows or the house-boat anywhere?

A. Yes, I saw the house-boat lying alongside the Bishop Wharf.

Q. And the other two scows, where did you see them?

A. They were lying in the slip.

Q. Now, I will ask you to state the relative sizes—how those two scows compared in size with the scow of the house-boat?

A. About twice the size, I should judge.

Q. A good deal larger? A. A good deal larger.

Cross-examination.

(By Mr. BRECKONS.)

Q. Captain, when did you see the scows?

A. Lying alongside the Bishop Wharf the morning after they came in.

Q. When did they come in?

A. That I cannot positively say. I didn't take note of the date. It was last summer sometime.

Q. And you saw them when they were tied up there?

A. The morning after they came in.

Q. How do you know it was the morning after they came in?

A. Because I was stationed on the quarantine dock.

(Testimony of Frederick Rouse.)

Q. Did you see them come in?

A. No; they came before I got there in the morning.

Q. These scows are the ones you referred to in comparing them with the house-boat? A. Yes, sir.

That is all.

Captain C. NIELSEN, recalled.

Direct Examination (Continued).

(By Mr. DUNNE.)

Q. Now, Captain, I want you to assume that the scows which were towed behind the house-boat were at least the same size as the scow of the house-boat, and, assuming that fact, I say will you give your reasons why you say that it was not properly made up?

Mr. BRECKONS.—He has not said it was improperly made up. You asked the opinion of him whether it was a proper tow.

Mr. DUNNE.—Now, Captain, assuming the tow was made up as I have described—say the tug comes first, then comes the house-boat, and then comes these two scows; and I ask you to assume also that, so far as the relative sizes of the scows are concerned, the two scows in the rear of the house-boat are at least as large as the scow of the house-boat. I ask you, then, whether, in your opinion, that tow was properly made up?

A. Well, if I had towed the three up I should have placed the strongest first and the weakest last. I would have put the strongest next to the steamer and

(Testimony of C. Nielsen.)

the next strongest behind that, and the weakest craft of all at the other end—the strongest in front.

Q. What would be the reason, Captain, for doing that?

A. Because the first one, the next one to the tug, will have all the strain on it at both ends, and the second one will have less and the last one would have only its own pull. By putting the weakest close to the steamer you would have all the pressure on it amidships. It is liable to strain it.

Q. What would be the effect of this double drag, the drag one way by the tug and the drag the other way by the scows behind? What effect would that have upon the timbers, say?

A. Well, strain them all over. It would put a heavy strain on them. There would be a pull on each end, a heavy pull on this and a heavy pull on that. If I was to tow two vessels, I should put the largest vessel in front and the smallest behind.

Q. Then the rule is to put the weakest part of the tow at the far end?

A. The lightest tow at the far end. That is what I would do.

Q. Now, you have been to Pearl Harbor, have you, Captain?

A. Yes, lots of times.

Q. When you are coming from Pearl Harbor to Honolulu and the northeast trades are blowing, is that a head wind or a fair wind?

A. That is more of a head wind, almost dead ahead.

(Testimony of C. Nielsen.)

Q. Now, assuming that there was a breeze blowing, northeast trade wind blowing, we will call it a good breeze, I would like to know whether the effect of the wind—in the first place, would a breeze like that make any seas?

A. It would be liable to make a swell in the sea.

Q. Now, what would be the effect of the wind and the sea upon a house-boat placed in the position that I have described with reference to this matter of strain? Would it increase it or diminish that strain?

A. It would increase the strain. When you have a heavy swell there is more strain. In a dead calm the strain would be less.

Q. Is there any part of the twenty-four hours when the sea between Pearl Harbor and Honolulu is smoother and calmer than at other times?

A. I have always found it calmer early in the morning, at possibly nine and ten o'clock.

Q. What has been your experience as to the afternoon?

A. Well, when the trade winds settle down steady, it always blows pretty strong in the afternoon until about sundown; that is when the trades once set in. In southerly weather it is different.

Q. Now, I will ask you, Captain, what is the purpose of putting a rudder on a vessel?

A. To guide her, to keep her straight.

Q. Now, if a vessel has no rudder, what is described among seamen by the term "yawing"?

(Testimony of C. Nielsen.)

A. That is yawing backward and forward, where you have a vessel on and where you have no rudder, and she yaws one way and the other way, and every time she goes off one way or the other you put a big strain on the tow. Where you have a rudder you can keep right straight behind the tow-boat.

Q. Now, if a vessel is being towed, and she has no rudder, would her own movement, in consequence of the absence of a rudder, have any effect upon a strain that she was subjected to?

A. Didn't I say so just now?

The COURT.—Please answer that directly.

A. Well, a vessel without a rudder, unless very smooth, and the third tow, it is almost impossible to keep them straight. They will sheer off one way and then the other, and you can never keep her straight for any length of time, and every time it puts a much bigger strain on the hawser and vessels towed. Whereas if she has a rudder she goes along steady and less strain and everything on both hawser and vessel. That is as near as I can explain it.

Q. I will ask you to describe, Captain, what the effect would be if in any way water made its entrance into the scow of the house-boat? What would the effect of the presence of that water in the scow of the house-boat be, she being towed under those conditions?

A. It wouldn't improve her any. The sooner you would pump it out the better.

(Testimony of C. Nielsen.)

A. Suppose there was no pump and this water got into that scow, how would it act?

A. It would act this way: That, as she starts to roll, as she would be bound to do more or less, she would roll more than without any water in it.

Q. Now, assuming, Captain, that there was an air-course running athwart-ships on the scow, for ventilation purposes, and that it was from two to three inches in the opening, I ask you if it would have been a wise precaution, a piece of careful seamanship, in proceeding to tow such a house-boat from Pearl Harbor to Honolulu, in the afternoon, to close up those air-courses?

Mr. BRECKONS.—We object to the question, if your Honor please, first as leading, second as not bearing on the issues in this case. The libelant in the case itself has undertaken to set forth the particular negligence complained of, but has not mentioned this one as being in the issues.

The COURT.—I will allow the question if it is put in a form that it not leading.

Mr. DUNNE.—I will ask you if, in your opinion as a nautical man, it would be a careful manner and method to operate the removal of such a house-boat if the air-courses were closed up?

A. I don't think it would be a very hard matter to close them up. It would certainly be much safer. It would not take long to put a batten over them. It is always better to be on the safe side.

(Testimony of C. Nielsen.)

Q. Now, I will ask you to state, in your opinion, whether it would be a careful thing to do, nautically speaking, to tow the house-boat up alone without any scows behind it?

A. If I had anything to do with it I should prefer to tow the boat all alone by itself.

Q. What are your reasons for that, Captain?

A. It would be safer all over. I would only have one rope to take care of, and I could guide the steamer, and whenever a sea and swell would strike it I could slow down and handle it better.

Cross-examination.

(By Mr. JUDD.)

Q. Would you qualify that answer at all, Captain, if the house-boat had any rudder?

A. Under any circumstances I would rather have her all by herself rather than with two or three other vessels.

That is all, Captain.

Captain FREDERICK ROUSE, recalled on behalf of the libelant.

Direct Examination.

(By Mr. DUNNE.)

Q. Captain, are you in any official position here in Honolulu?

A. I am with the quarantine people, yes, the United States Marine Hospital.

(Testimony of Frederick Rouse.)

Q. Now, I will ask you for your opinion as to the making up of a tow which I will assume to have been made up in the following manner: First comes the tug, then comes a house-boat, then come, all in tandem, two laden scows; the tow being from Pearl Harbor to Honolulu harbor, in the afternoon, when the northeast trades are blowing, a fair breeze. I ask you whether, in your opinion, such a tow was properly, seemingly, made up?

A. No; I should think not.

Q. Why not, Captain?

A. Well, because generally they always put the weaker vessel on the far end.

Q. What is the reason why the weaker vessel should be placed at the far end?

A. Because there is less strain and she is more protected by the tow ahead of her.

Q. You say there would be less strain. Where would that strain come from, where would it be, if the weaker vessel were put in between?

A. Well, there would be a strain all over.

Q. Where would the strain come from?

A. Well, I should think all over the vessel, because there is a constant pull on both ends.

Q. You have, I suppose, visited Pearl Harbor?

A. Not by water. I have been down by land.

Q. You have seen the house-boat involved in this case?

A. Yes, sir.

Q. Did that house-boat have a rudder?

(Testimony of Frederick Rouse.)

A. Well, I don't think it did; at least I never saw it.

Q. These scows that I have referred to, have they rudders? A. No, I don't think so.

Cross-examination.

(By Mr. BRECKONS.)

Q. What has been your experience in the towing business, Captain?

A. Well, I was three years tow-boating in and out of Boston, Galveston, New York and New Orleans.

Q. How long ago? A. 1894.

Q. What business have you been in since then?

A. Following the sea.

Q. Have you been in the tow-boat business since then? A. Once, yes.

Q. How long? A. Six months.

Q. Where? A. That was in 1894.

Q. Since that time you have not followed it in any way? A. Not the tow-boat business, no.

Q. You are not acquainted with the sea trip between Pearl Harbor and Honolulu? A. No, I am not.

Q. In what capacity are you now employed by the Marine Hospital Service?

A. I am in charge of the quarantine launch.

Q. (To the Stenographer.) Mr. Stenographer, will you turn to Mr. Dunne's question, in which the opinion of the witness is asked as to the making up of the tow?

The STENOGRAPHER.—(Reading:) “Q. Now, I will ask you for your opinion as to the making up of a tow

(Testimony of Frederick Rouse.)

which I will assume to have been made up in the following manner: First comes the tug, then comes a house-boat, then come, all in tandem, two laden scows; the tow being from Pearl Harbor to Honolulu harbor in the afternoon, when the northeast trades were blowing, a fair breeze. I ask you whether, in your opinion, such a tow was properly, seemingly, made up?"

Mr. BRECKONS.—Q. (To the Witness.) Your answer to that was you did not think so, because the weaker vessel should have been put last?

A. Yes, sir.

Q. Now, Captain, why did you say that, when there is nothing in the question as to which was the weaker vessel?

A. Well, my opinion of the scows I seen, the scows, the three scows.

Q. They were the same scows you saw?

A. Sand and freight scows.

Q. So your opinion as to whether that tow was made up in a seamanlike manner is based on the presumption that the scows which you saw were the scows in the tow? A. What I know of the scows, yes.

Q. And the ones which you saw and which you assume were part of the tow were the sand scows, were they? A. I should say yes.

Q. Several times larger and heavier than the house-boat? A. Yes.

Q. And out of all proportion to the house-boat in weight and size? A. Yes, sir.

(Testimony of Frederick Rouse.)

Q. How many times have you seen them?

A. I could not say, I am sure.

That is all.

Redirect Examination.

(By Mr. DUNNE.)

Q. Those scows that you have described, are they decked? A. I think so; I wouldn't be sure.

Q. When you saw them the next morning what, if anything, did you see on them?

A. They were full of machinery, pipes and things like that.

Q. Did you notice any chains or anchors on them?

A. I didn't take notice of them if they were.

Q. You did see them loaded up with machinery and pipes?

A. Yes, with pipes and machinery and one thing and another.

Recross-examination.

(By Mr. JUDD.)

Q. Did you note what kind of machinery that was?

A. I noticed particularly there were a lot of pipes; that is about all I noticed.

Q. Have you any idea what kind of pipe?

A. Suction pipe, for running water through.

Q. Twenty or twenty-four inch?

A. I suppose twenty or twenty-four inch pipe.

That is all.

(Libelants here rested their main case.)

JOHN SCOTT, sworn on behalf of libelees, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. How old are you, Mr. Scott?

A. Forty-nine in November.

Q. You are a sea-faring man?

A. For thirty years.

Q. Are you a certificated officer? A. Yes, sir.

Q. In steam? A. In steam, yes, sir.

Q. Registered in what district?

A. San Francisco, California.

Q. In August last, August, 1903, by whom were you employed? A. Cotton Brothers.

Q. Employed by them in what capacity?

A. In the capacity of master of the steamer "Kaena."

Q. Do you remember—state whether or not you remember what the steamer "Kaena" was doing on the 4th day of August, last year? In the first place, where was the "Kaena" on that day?

A. The "Kaena," I had charge of her all night the night of the third, towing sand scows from Pearl Harbor to Honolulu. I was relieved at seven o'clock in the morning.

Q. Of what day?

A. Of the fourth. I was relieved at seven o'clock. The day captain's watch came on then.

Q. In the afternoon of the fourth of August what was the tug doing?

(Answer inaudible.)

(Testimony of John Scott.)

Q. Speak up louder. I will remodel the question. Do you remember what the tug was doing on the third of August?

A. She was towing scows of different sizes up here to Honolulu with material left over from the work there on the third.

Q. On the fourth of August what was she doing?

A. On the fourth of August I was relieved at seven o'clock in the morning and the tug was in charge of Captain Doran, the day captain. He brought up the scow billy which was used for carrying up and down coal used in the work. He returned from Honolulu to Pearl Harbor at half-past one on the fourth. I had been asleep that morning, as I had been up the night before sending scows to Honolulu. He came to me and reported, "Captain, I have orders to bring up the house-boat if the weather permits." I said, "How is the weather outside?" He said, "Smooth, nice; there is no wind inside." He said if the water was smooth he would bring up the house-boat and these two scows behind and clean up the whole job.

Q. Up to that time, Captain, that is at half-past one on the day of the fourth of August, what scows were there at Pearl Harbor belonging to Cotton Brothers?

A. There was a small water scow, a small anchor scow and one skiff, beside the house-boat.

Q. Were there any sand scows remaining?

A. No, sir; I towed them up the night before.

Q. Did you see how the tow was constructed?

(Testimony of John Scott.)

A. Yes, sir.

Q. State whether or not those scows which you have just mentioned were in that tow?

A. They were in the tow; yes, sir.

Q. Do you remember the dimensions of the water scow, the anchor scow and the house-boat?

A. Pretty near. The house-boat it was fifty feet by twenty, the hull; three feet deep. When the top hamper was on she drew thirteen inches of water.

The COURT.—Q. What are those dimensions you are giving, the water line or the deck?

Mr. JUDD.—Approximately the size of the scows.

Q. In describing the house-boat, giving these dimensions, do you mean the deck or water line?

A. The top side of the hull of the scow.

Q. The deck of the hull?

A. The hull, not the platform; the top of the hull.

Q. What followed the house-boat in the tow?

A. Well, the scow that was called the water scow.

Q. Was there any water in it?

A. We were not carrying water up here.

Q. Can you state the dimensions of the hull of the water scow?

A. Yes, sir; twenty-seven feet long, ten feet wide, three feet deep; the top of it the same as that desk (pointing to the clerk's desk); a square box as it were.

Q. Will you state—when the tow left Pearl Harbor with what, if anything, was that scow loaded?

(Testimony of John Scott.)

A. It was not loaded. There was nothing to put on it. It was the same as the top of that desk.

Q. At that time what was she drawing?

A. About six or seven inches.

Q. What boat in the tow followed the water scow?

A. A small anchor scow, for picking up light anchors.

Q. Will you please state, if you can, what the dimensions of the hull of that scow were?

A. Yes, sir; that anchor scow was about twenty-two feet long; nine feet, six inches beam, and it was two and one-half feet deep from the rail down to the bottom. She drew about five inches of water, five, six or seven; with a little water in her she might draw seven.

Q. At the time the tow was made up with what was she loaded?

A. Nothing but a winch, a little derrick for picking up small anchors.

Q. You state that the tow was made up with the house-boat first, the water scow next and the anchor scow followed that.

Q. Was there any other vessel or boat?

A. A small skiff, a skiff that two men could pick up on the shore; a small skiff belonging to one of the natives.

Q. Will you kindly state how that tow was made up with reference to the cables that were used?

A. Well, the cable used—we had one hawser which is

(Testimony of John Scott.)

a six inch tow-line. That was about twenty-seven fathoms. It had been thirty fathoms and we cut off three; about twenty-seven fathoms long. On the house-boat there are two bits or posts and on these posts around the bottom was a chain bridle in a V-shape, with a large link or shackle in that bridle for towing purposes. My hawser was made fast to that chain bridle.

Q. Was that chain bridle part of the house-boat or part of the scow?

A. That chain bridle belonged to the house-boat. It was there when she was taken to Pearl Harbor and it is there yet.

Q. And how large were the cables from the house-boat to the scows following?

A. Small lines made fast to the water scow, two or three inch. As a matter of fact, the wind has an effect on a big house like that and in order to steer that house-boat I put this small water scow and anchor scow behind it, in order to steer it.

Q. When did you say the "Kaena" left Pearl Harbor with the tow?

A. Left Pearl Harbor, as near as I can remember, about half-past two.

Q. At that time what was the condition of the wind?

A. The wind was very light, northeast, nor'-nor' east.

Q. When you got outside the harbor did the wind remain the same, or was there a change?

A. No; the wind was in the same direction. I think

(Testimony of John Scott.)

it was going along all right. I was laying on deck on a mattress.

Q. The deck of what boat?

A. The "Kaena," when the day captain was in charge. I came on duty at six o'clock again.

Q. What is his name?

A. Doran. At 4:55 I wasn't asleep. I was tired, that was all. I lay on deck. Mr. Wheeler was the engineer in charge at the time. He sat in the door of the engine-room watching the tow. Suddenly he said, "Look at the house-boat." She got capsized, overturned from seaward and as soon as she turned a little the stove and bureau they ran down the leeward side and over she went. The top side of that house went over to the water's edge. She was three-corner ways up from the water. I jumped on my feet and said, "Stop her."

Q. Whereabouts, Captain, on the trip up did this happen?

A. Right abreast of Kalihi reef.

Q. What was the condition of the water at that time?

A. The water was pretty smooth. There was no sea at all. In fact on that apron there there were two Chinese or Japanese laying there all the time. If there had been any sea they could not have stayed there; they would have been washed off; they would have got wet.

Q. After you took charge of the "Kaena," after you saw there was trouble, what did you do?

A. As soon as I stopped the boat I immediately backed down and got the crew to haul in the tow-line.

(Testimony of John Scott.)

The Chinese crew and waiter were asleep. Their room was on the side that went down. There were three white carpenters on board the boat. I called out to save everybody there. Certainly, I didn't want to see any life lost. I wanted to get the lives out and sung out, "Is everybody all right?" and they said, "Yes." They were taking the bedding and mattresses and throwing them on these small scows behind the house-boat. They got everything out they could save. Well, I consulted with the mate and chief engineer. We said very well, we will try and see if we can get up to Honolulu as it is. We started to tow very slowly again and started to tow to Honolulu. Well, I found out I could make no headway; I couldn't move that house-boat in the condition it was in; the more I towed the more I pulled the house off. I took my lead line and sounded over the side to see what water I had. I could get no bottom at thirty fathoms and I headed right in for the beach, headed until we got soundings, headed right in to the entrance of Kalihi channel. I got in until I got fifteen fathoms of water. It was getting dark. "Well," I said, "I can't stay here all night with this thing and the people on those scows. I must get to Honolulu in some way"; so I did the best I could. I made an anchor fast to the tow-line and when I got into fifteen fathoms I dropped the anchor overboard and anchored there. I picked up the anchor scow and water scow and skiff and towed into Honolulu.

Q. At that time, Captain, what were those two scows loaded with? A. Nothing.

(Testimony of John Scott.)

Q. After leaving the house-boat?

A. Oh, trunks, bedding, clothing, or anything they saved out of the house-boat.

Q. Then what did you do?

A. I brought the people and the two little scows to Honolulu, to Bishop slip. I immediately went up to Mr. Agassiz's house, who was the manager in Honolulu. I proceeded to his house and reported the matter to him. He says it is too bad.

Q. Then what did you do, Captain?

A. I waited for his orders. I said what can I do. He says, "Is she anchored in a safe place?" I said "Yes." Then, "John," he says, "have you got your crew there? I suggest you go right back, get the boat out and get what you can of that house-boat in. I suppose before this the house will be gone off." I expected that myself; but I went back; I left Honolulu at eleven o'clock at night; I went down to Kalihi, got off there about ten minutes past twelve on the morning of the 5th. The boat was still there, but part of the house it had worked and worked until it collapsed. The house was built the same as you would build a house on that desk. It wouldn't take a lot of surging to surge that top from it. The house was gone. The cooking-stove remained on one side; a big cooking-stove and a big bureau, they stayed, and one big ice-box stayed. The cooking utensils there and part of the side of the house fell in. The lee side was broken and gone. Therefore, the weather side was resting on top.

(Testimony of John Scott.)

Q. And that was its condition, then, at midnight when you got down there? A. Yes.

Q. Then what did you do with reference to the house-boat?

A. I immediately put a hook-line on the tow-line and backed right up to her and put this big hook under the tow-line and ran that line until I got the anchor and then went right along to Honolulu, and it took nearly three hours to get to Honolulu from there. I was not more than two miles from the mouth of Honolulu Harbor, so you can imagine the condition it was in.

Q. When you reached Honolulu with that tow where did you place the house-boat?

A. Alongside Bishop slip. I placed a watchman in charge of her until morning. I was tired out and went home. I left the watchman to take care of her until morning, so that nothing that was there could be walked off with.

Q. How long were you familiar with the house-boat previous to the day of the accident? How long had you seen the boat?

A. I had seen her pretty nearly since she was built.

Q. Could you give approximately how long it was?

A. I couldn't tell. I towed her to Pearl Harbor and lived aboard her all the time down there.

Q. Are you familiar with the way that hull was constructed? Did you ever examine the hull?

A. Never very thoroughly.

Q. After the accident did you examine the hull?

(Testimony of John Scott.)

A. After the accident I naturally went aboard to see how that top house was fastened.

Q. What did you see?

A. I saw the way the hull was; it was just the same as you would build that desk. The hull is there to be seen by anybody in the city of Honolulu who wants to see it now.

Q. Was it or wasn't that house-boat constructed with air courses in the hull?

A. Not that I am aware of. I never saw any.

Q. You saw none after the accident when you made that examination you have testified to?

A. I saw none. There are little ports inside around the deck, out towards the sides of her.

Q. Do you remember, Captain, when you towed the house-boat to Pearl Harbor? A. Yes, sir.

Q. From whom did you receive her on that day?

A. From here?

Q. Yes; when she was in the harbor who turned her over to you?

Mr. DUNNE.—We object as immaterial. What is the object, Mr. Judd?

Mr. BRECKONS.—The object will be to show she was delivered to the libelees in this action by Mr. Almy, as one of the links in the evidence showing his agency for the owner.

(Discussion.)

(Last question withdrawn.)

(Testimony of John Scott.)

Q. The question being withdrawn, Captain, I will ask you what experience you have had in the towing business?

A. Well, I have been off and on tow-boating in Philadelphia. I was raised in a tow-boat, from twelve to seventeen; I was on nothing but tow-boats as a boy; from then on; I came to California; I came out in the "Alameda"; I tow-boated in the bay of San Francisco until four years ago on Spreckels tow-boat there.

Q. From your experience as a tow-boat man, were the conditions of wind and water such as make it safe to start from Pearl Harbor with that tow?

A. Perfectly safe.

Q. At that time? A. Yes, sir.

Q. From your experience as a tow-boat man and your knowledge of the facts at that time was that tow properly constructed? A. Yes, sir.

Cross-examination.

(By Mr. DUNNE.)

Q. Captain, you said the orders were to tow up the house-boat if the weather permitted, and to tow the two little scows behind us so as to clear up the whole job; that is correct, is it? A. Correct.

Q. In other words, Cotton Brothers had a dredging contract, didn't they, down there?

A. I believe so.

Q. And that contract was just about finished?

A. The contract was finished.

(Testimony of John Scott.)

Q. And during the 3d of August you had been *on* duty with the tow-boat bringing up on the scows the material left over from that job?

A. No, sir; I didn't, but the day captain had on the 3d day of August.

Q. I mean the tug, whoever was in charge?

A. Yes, sir.

Q. And at this time there was really nothing left there except the house-boat and these two scows and the idea was to bring them all up at once and clean up the job; is that correct? A. No, sir; it ain't.

Q. I say this, the tow-boat having been busy the evening of August 3d towing up scows with the remaining material, wasn't the idea this: that the house-boat and these two little scows should all be towed up at once to clear up the whole job? Isn't that correct?

A. That is correct; that was on the day of the 4th, sir.

Q. Now, what time was it when the tow started?

A. About half-past two, twenty minutes past two, in the afternoon.

Q. And what time was it when you reached the entrance to Pearl Harbor?

A. I don't know, sir; I didn't take time.

Q. What time was it when you reached the place where the accident occurred?

A. Four forty-five P. M.

Q. How far, towing distance, was the place where

(Testimony of John Scott.)

the accident occurred from the place where the tow started?

A. Five and one-half miles to six. I could not be sure of the exact distance.

Q. And how far was the place where the accident occurred from Honolulu?

A. A mile and a half to two miles.

Q. Is the "Kaena" a low power or a high power boat?

A. She is a kind of single engine affair.

Q. Do you know what horse-power she is?

A. I do not. I am not an engineer; I never seen a card taken off her.

Q. What force, what employees, were on the "Kaena" belonging to Cotton Brothers proper?

A. What is that?

Q. What crew did the "Kaena" carry?

A. Two crews; ten people all told.

Q. A day crew and a night crew?

A. Yes, sir; and we were all aboard at that time.

Q. The day crew had five men and the night crew had five and that is all; so that five people were in each crew?

A. Yes, sir.

Q. That is to say, a master, a mate, a—

A. (Int.) No, there is two masters.

Q. How many mates? A. No mates.

Q. How many engineers, Captain?

A. Two engineers.

Q. How many firemen? A. Two firemen.

Q. How many deck hands?

(Testimony of John Scott.)

A. Four deck hands.

Q. Captain, you said something about putting the scows behind the house-boat to act as rudders for the house-boat?

A. Yes, sir.

Q. Then the house-boat didn't have a rudder?

A. No, sir.

Q. Did these scows have rudders, Captain?

A. No, sir.

Q. Now, were any of Cotton Brothers employees on board the house-boat?

A. Yes, sir.

Q. These men at the time of the accident were taken off by you, were they?

A. No, sir.

Q. How were they taken off?

A. Those scows behind the house-boat naturally, when we came up after them, and these people got off the house-boat and stepped on the scow. I didn't take them off.

Q. That is the way. The fact is they left the house-boat?

A. They didn't stay in the house-boat any more after she capsized, as it were.

Q. How many of these men were there?

A. Two or three carpenters, and one machinist, two Chinamen, or three; I think two Japanese were aboard her, a Japanese woman or two.

Q. That is three white men, two Chinese and two Japanese?

A. I think a Japanese woman or two.

Q. Seven or eight people?

A. Yes, sir.

Q. I will ask you if there was anybody aboard the

(Testimony of John Scott.)

“Kaena,” that house-boat, or aboard the scows at any time during this transaction except employees of Cotton Brothers? A. No, sir.

Q. Now, Captain, you said that Mr. Wheeler called you to see the house-boat. You were lying down at the time and the word you used was “capsized.”

A. No, I didn’t see it; I believe Wheeler called me. He drew my attention to it.

Q. Captain, what made that boat capsize? Why did she capsize?

A. Simply because she had been laying there so long her seams opened up by towing her.

Q. Laying where?

A. At Puuloa. One end was on the beach. The end I towed had a chain bridle attached to it with two bitts and that end was afloat. The other end was on the beach. I towed her off and made those small stakes fast.

Q. I exhibit to you a small photograph and ask if that represents the position of that house-boat beached? A. Yes, sir; it does. Correct.

Mr. DUNNE.—This will be Libelant’s Exhibit No. 2. We offer in evidence this photograph.

Q How long, Captain, did you observe that house-boat with one end ashore, beached as you call it?

A. For at least six months.

Q. That is to say six months just prior to the time you towed her up? A. Yes.

(Testimony of John Scott.)

Q. Now, suppose, Captain, that she had been towed up alone, without anything pulling behind her, quietly, carefully, at a slow rate of speed, a time selected when the wind and sea would be especially favorable—suppose all those precautions had been taken, don't you think she might have reached Honolulu uninjured?

A. No more than the way she was towed. The weather was fine and everything on the way down. I was laying on the deck on a mattress and there was no sea. Her seams opened up from naturally laying too long on the beach and the people aboard didn't know she was foul at all. The stove wasn't fast, the bureau wasn't fast. They slid over.

Q. Now, Captain, how much free-board was there on the hull of the scow proper?

A. About seventeen inches, or eighteen inches. She drew thirteen inches.

Q. So that the top of her free-board above the surface of the water would be about five inches?

A. Oh, no, no.

Q. What was the total amount of free-board?

A. You mean to say above the water's edge? The hull from the topside down to the bottom was three feet.

Q. I don't mean the amount of free-board from the top of this platform at all, but I mean here (illustrating on the model). What would be the planking there?

A. She drew thirteen inches of water. Now, take thirteen inches from three feet.

(Testimony of John Scott.)

Q. So that thirteen inches from thirty-six inches would leave twenty-three inches? A. Yes, sir.

Q. Now, Captain, do you mean that while this boat was being towed along from Pearl Harbor to Honolulu that she was absolutely stationary so far as up and down movement was concerned?

A. I didn't mean to say anything of the kind.

Q. There was more or less dip to the scow, wasn't there? A. Yes, sir.

Q. Was there dip enough to bring the under side of this platform to the water's edge?

A. No, sir; not enough.

Q. Not enough for that? A. No, sir.

Q. The fact that this house-boat was ashore for the greater part of this six months was a fact generally known, wasn't it, to everybody down there who lived on board the house-boat, the fact that there was one end on the shore?

A. One end was on the beach all the time.

Q. And there was a plank from the platform to the land? A. Exactly.

Q. When you commenced to tow up you pulled her off the shore, did you? A. Yes, sir.

That is all.

The COURT.—I understand you to say that one end was on the botton during this six months?

A. Well, your Honor, I couldn't state the exact time; it would be about six months.

(Testimony of John Scott.)

Q. So when the tide flowed the other end would dip some?

A. There was so little tide one end was always afloat entirely and the other end on the beach it was almost afloat and the tide had no effect on her at all.

Q. So a good part of her bottom was resting on the sand beach? A. On the sand beach; yes, sir.

The COURT (To Counsel).—There is another matter of information; I don't know whether to ask it. A good deal of questioning has been done as to whether it was a safe thing to tow this vessel up at the kind of weather existing at that time. I should like to have this witness asked whether it was safe to take a house-boat of that kind out in the open sea when there was any swell, referring to the fact of the house-boat being built on a deck without being built into the deck.

Mr. DUNNE.—Q. Would it be a safe thing to tow a house-boat like this, under these conditions, having reference to a heavy swell?

A. No; I wouldn't have undertaken to tow her in a swell. The water was perfectly smooth. Mr. Agassiz says if the weather permits bring up the house-boat. I wouldn't have brought her up at all if the weather was not perfect. The weather was fine.

Q. Wasn't even a swell?

A. Certainly not.

The COURT.—Q. The whole accident was on account of the fact that her seams were opened and she leaked until she had enough water to lay her on the side?

(Testimony of John Scott.)

A. She went over very suddenly; so suddenly that the men hardly had time to get out of her. As soon as I heard the engineer say "Look at the house-boat," I sung out "Stop her."

Q. Do you know how much water there was in her at that time?

A. I had an idea that the hull of the thing was tight, because walking on the floor of that hull was like walking on the floor of this room, and the people aboard—there were three carpenters aboard, ship's carpenters—two carpenters and a mechanic—they were aboard and surely if water appeared they would have found it under their feet. The hull filled under the floor and she naturally went over as suddenly as that. I did all that man could do to save the thing. There was nothing to save only what I did save.

P. M. Session, May 23d, 1904.

Mr. BURT WHEELER, called on behalf of the libellees, being first duly sworn testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. Please state your full name, Mr. Wheeler.

A. Burt Wheeler.

Q. On the 4th of August last, August 4th, 1903, were you an engineer aboard the tug "Kaena"?

A. I was.

(Testimony of Burt Wheeler.)

Q. On the afternoon of that day what was the tug doing?

A. Making a tow from Pearl Harbor to Honolulu Harbor.

Q. Do you remember what time, approximately, it was that you left Pearl Harbor?

A. Well, a little—if my memory serves me right, a little bit after twelve; how much I don't know. After lunch we started to get the tow ready and probably it was two o'clock when we got away.

Q. How was that tow constructed? That is, what vessels were in the tow?

A. First came the tug, then the house-boat; after the house-boat was a water scow and then an anchor scow.

Q. Did they compose the tow?

A. Well, a small skiff I forgot to mention.

Q. And they were placed in that order?

A. That order.

Q. Let me ask you, what was the relative size of the water scow with reference to the house-boat?

A. Well, it was very much smaller. I never measured either one, but the water scow, I should say, was about twenty-four feet long and probably ten feet beam, and probably a depth of two feet.

Q. And the anchor scow?

A. Was smaller than the water scow.

Q. What about the skiff? What was the size of that?

A. An ordinary skiff, possibly sixteen feet long, eigh-

(Testimony of Burt Wheeler.)

teen maybe; I don't know exactly what size it was; a small skiff; one pair of oars.

Q. When you left Pearl Harbor, with what, if anything, were those scows laden?

A. They had nothing at all on them.

Q. Neither the water scow nor the anchor scow?

A. No, sir.

Q. At the time you left Pearl Harbor, state briefly the condition of the water and the weather.

A. Regarding waves and things?

Q. Yes. How was the water?

A. The water was smooth. Of course there was a small ocean swell, but the wind-waves were very light, very small wind-waves. Inside there was not any at all.

Q. And where was the wind from, what direction?

A. Northeast trade.

Q. What time was it, Mr. Wheeler, that you noticed, if you did notice, anything wrong in the tow?

A. It was shortly after four o'clock that I noticed it.

Q. Where were you at the time?

A. I was seated in the door of the engine-room and I looked back and saw the house-boat beginning to careen to one side and saw the house breaking away from the deck on the starboard forward corner by that first window there (pointing to model), calling this the starboard end, because the bridle is on this end of the boat.

Q. What do you mean by "breaking away"?

A. Breaking away from the hull, from the bottom of the vessel and was bending and swaying like that (ges-

(Testimony of Burt Wheeler.)

tiulating) with the motion of the waves; whenever she rolled that end (pointing to model) appeared and then would go down again.

Q. When you observe that what did you do?

A. I called the captain's attention to it, or the mate rather who was in charge at the time. I sung out to him; he was near, a short distance.

Q. And you returned to the engine-room?

A. Yes, sir.

Q. When you came up again on deck what did you see with reference to the house-boat?

A. Well, she had settled more to the port and the gap in the side was growing larger and further aft.

Q. What was being done to the house-boat?

A. Well, there was nothing being done, except people were taking out dunnage, bedding; stuff like that; whatever they could carry.

Q. And where was this bedding being put?

A. Onto the water scow, just astern.

Q. How long have you followed the sea, Mr. Wheeler?

A. Well, about twelve or fourteen years.

Q. And your present employment is what?

A. I am in the navy now.

Q. Have you during these twelve or fourteen years ever served in the towing business?

A. I served in the towing business in San Francisco and I came here as chief engineer of the steamer "Fearless."

(Testimony of Burt Wheeler.)

Q. The tug "Fearless"? A. Yes, sir.

Q. In your opinion as a tow-boat man, was that tow properly constructed?

A. I should say it was properly put together.

Q. In your experience as a tow-boat man, was it safe, taking the condition of the water and wind into consideration, to bring up the tow at that time?

A. I should say it was safe.

Q. By the way, how did you occupy yourself from the time the tow left Pearl Harbor until the accident happened?

A. Watching the engine and watching the tow. I mean by that that in towing it is an engineer's place to watch the line, to watch the tow-line as well as to look out for his engine, and I stood in the door of the engine-room where I could see the engine and also watch the tow.

Q. What was the condition of the tow on the way up?

A. It was all right until I noticed the accident. I don't know how long it might have been before I saw it, but up to that time it was coming along all right.

Cross-examination.

(By Mr. DUNNE.)

Q. Mr. Wheeler, do you know Mr. Allan Dunn?

A. Beg pardon?

Q. Do you know Mr. Allan Dunn?

A. Only by reputation.

(Testimony of Burt Wheeler.)

Q. Do you recognize him sitting here in the court-room?

A. Only just from having seen him on the street; that is all.

Q. Do you remember meeting him on a Rapid Transit car on the evening of August 6th or 7th, a night or two after the house-boat was lost? A. No, I don't.

Q. Do you remember being upon that car and he and a friend were sitting in the seat just in front of you and talking about the loss of the Almy house-boat?

A. No, I don't recall it. I was talking with several people about the wreck of the house-boat.

Q. I will ask you if on that occasion, while Mr. Dunn and his friend were talking about the loss of the Almy house-boat, you did not break into their conversation and ask if they were talking about Almy's house-boat, and then that you proceeded to say that they, meaning Cotton Brothers, had made a nice mess of it; that it was a bum job of towing to place the house-boat between the tug and the scows; and that you were not surprised that the house-boat was wrecked; that you were on the tug at the time; that the men who were on the house-boat told you they had been calling to the tug for fifteen minutes before anything was done towards helping them; and that the tug-men could not have been watching their tow; and that those on board the house-boat had been drinking whisky and were not watching the house-boat's condition, and that some of this whisky was saved?

(Testimony of Burt Wheeler.)

A. No, sir; I did not say anything of the kind.
That is all.

The COURT.—So far as you know, what was the cause of the disaster to the house-boat?

A. Well, as far as I know it was caused by being laid-up there on the—well, practically on the beach; at different stages of the water it would be afloat and then at one end, in-shore end, all on the beach. While lying there in still water, in my opinion she dried out above the water line and her seams opened up. Then the house was not properly fastened to the hull for another thing, and when she got out and got into the sea, the motion opened up the seams a little bit, and as she got more water into her, that motion became more aggravated, and when she commenced to rock and rocked the house loose from the hull, she carried away.

Captain WILLIAM OLSEN, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. What is your full name, Captain?

A. William Olsen.

Q. You are a seafaring man, Captain? A. Yes.

Q. How long have you followed the sea?

A. Twenty-two years.

Q. Your present employment is what?

A. Master of the tug "Fearless."

(Testimony of Captain William Olsen.)

Q. How long have you been in the towing business?

A. Since 1889.

Q. Are you familiar with the tug "Kaena"?

A. Why, I have seen the boat.

Q. Are you more or less familiar with conditions of weather and water around Pearl Harbor, between here and Pearl Harbor?

A. Oh, yes.

Q. Suppose, Captain, that over that water, between Pearl Harbor and Honolulu, with the northwest trades blowing and with smooth water, the tug "Kaena" or a boat of her size should attempt to tow a house-boat fifty by twenty, being a double deck concern, and behind the house-boat should have attached a water scow twenty-seven by ten, and in the rear of that an anchor scow about twenty by ten, and a skiff behind that—would that construction of the tow be, in your opinion, a proper construction? A. It would.

Cross-examination.

(By Mr. DUNNE.)

Q. Captain, if that house-boat you speak of had been hung up on the beach for six months and you knew it; hung up on the beach so that when you wanted to go aboard and come off you walked up and down a plank that went from the platform rail down on to the solid earth, and that she appeared rotted out; seams opened up; when you commenced to tow her you had to pull her right off the land—do you think in a case like that

(Testimony of Captain William Olsen.)

that it would be careful, cautious, prudent seamanship to tow such a boat?

A. Well, a house-boat of that size, of that shape, erected as that is, only draws a few inches of water and they do not lay heavy on the sand.

Q. Well, you do not answer the question, Captain. Suppose the house-boat had been aground for six months, the tide ebbing and flowing under one end of it; the other end fast upon the beach, so that people who came on board of her and left her went up and down a plank that went from her platform to the land; suppose she had dried out; suppose that her seams had opened up—would you say that, under those conditions, it would be careful, cautious, prudent seamanship to attempt to tow such a vessel?

A. Well, if you towed her up carefully it could be done.

Q. How?

A. Drawing her carefully and slowly.

Q. And with anything behind her?

A. Yes; it would improve her.

Q. And you still think that with a boat whose seams had dried out, whose seams had opened up, you still think it would be a careful, cautious and prudent piece of seamanship to tow that boat?

A. I say it could be done by towing it up carefully, slowly.

Q. Yes, I know; but would it be careful, cautious and prudent seamanship to do it?

(Testimony of Captain William Olsen.)

A. I was not there and didn't see how much her seams were opened up and I don't know how long she was on the beach. I say it could be done by towing her up carefully.

Q. Now, I am telling you. You say you don't know—she was six months on the beach in Pearl Harbor, and, as one witness expresses it, her seams had dried out and opened. Now, under those conditions, with a boat like that practically a sieve, would it be proper to tow such a vessel as that?

Mr. BRECKONS.—I object to the question, if your Honor please. There is no evidence that the boat was practically a sieve.

Mr. DUNNE.—I withdraw that phrase. I tell you she was six months upon the shore; the testimony of the witness is she was six months upon the shore, and one witness swears here she had dried out and that her seams had opened up—

The COURT (Int.).—That, Mr. Dunne, means she was on the land, on the bottom solid on the bottom?

Mr. DUNNE.—Yes; and here was the tide under it; one end of the boat on the land and the other end in the water. Now, I ask you if you still insist it was careful, cautious and prudent seamanship to attempt to tow such a vessel as that, under those conditions?

A. I will give the same answer. I say it could be done.

(Testimony of Captain William Olsen.)

Q. But would it be careful, cautious and prudent seamanship to try to do it?

A. Yes, if you wanted the boat at Honolulu; yes.

Q. Now, suppose, in addition to those facts, Captain, that there was a fair swell on, more or less sea, under those conditions do you think it would be proper and careful seamanship to attempt to tow a vessel of that character?

A. Not if there was blowing a very strong breeze, or heavy sea.

Q. I said neither a strong breeze, nor did I say a thing about a heavy sea. I said a fair breeze, some swell and a moderate sea. Under those conditions, would it be proper, careful, cautious and prudent seamanship to tow such a vessel?

A. I think it would.

That is all.

Mr. GUS STREM, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. Mr. Strem, what is your business?

A. I am a carpenter, ship's carpenter.

Q. How long have you followed your profession as such?

A. For twenty-seven years.

Q. Are you a seafaring man? A. Yes, sir.

Q. How long have you followed the sea?

(Testimony of Gus Strem.)

A. Twenty-two years.

Q. In August of last year were you employed by Cotton Brothers? A. I was; yes, sir.

Q. On what job? A. At Pearl Harbor.

Q. What were you doing the afternoon of August 4th, if you remember? A. On August the 4th?

Q. I withdraw the question. Did you ever see the house-boat that is in controversy in this case?

A. That is the time we towed the house-boat, on August 4th.

Q. Who towed up the house-boat?

A. The tow-boat "Kaena."

Q. The "Kaena"? A. Yes.

Q. Were you on the tug?

A. No, I was on the house-boat.

Q. What else was in that tow on that day?

A. There was a water scow and an anchor scow and a skiff.

Q. How were they arranged? Which came first?

A. First the house-boat was towed; then there was a water scow, ten by twenty-seven, or something like that; then the anchor scow, ten by twenty; and then a skiff, about sixteen foot skiff.

Q. Who made the tow up, Mr. Strem?

A. I did; I did myself; fastened the line in front. I was left in charge by Mr. Agassiz, of the firm of Cotton Brothers.

Q. You made the trip up to Honolulu, did you, at that time? A. Yes.

(Testimony of Gus Strem.)

Q. Where were you? What situation did you have? Where did you stay? Where were you?

A. When?

Q. On the trip up?

A. I was on the house-boat. When the house-boat started to break up I was right in front.

Q. What were you doing there?

A. Just sitting there watching the things, taking care of the things coming up.

Q. When did you first notice that anything was wrong?

A. Well, the first we noticed was when she started to break her fastenings on the starboard side. We were sitting there talking, the same as I am sitting here. The first thing I knew the deck started to keel over.

Q. What do you mean by "fastenings"?

A. That is, the way the house is fastened to the hull.

Q. Do you mean above the deck?

A. Right as fastened to the scow.

Q. After it went over what did you do, Mr. Strem?

A. We tried to save ourselves, to get away without getting drowned, to get back to the scows.

Q. By the way, when the tow left Pearl Harbor what were those two scows laden with, if anything?

A. What do you mean?

Q. What was in the water scow?

A. Nothing at all.

Q. And how about the anchor scow?

A. It was empty. What we used her for was laying

(Testimony of Gus Strem.)

anchors, ships' moorings, etc. There was no weight to that. The thing would not hurt anything on account of the tow.

Q. From your experience as a boat builder and from what you saw that day, will you kindly tell the Judge what you think caused the accident.

A. I could not tell that, only that the house was not strong enough to stand—only tie-nailed with twenty penny nails. Them posts (pointing to model) are only so fastened, so nailed, a little bit of rocking with a high house like that when the tug went to sea would naturally the minute you would start it, it break it loose; that is what happened. There was hardly any wind or anything; that is what I can say.

Q. How do you know, Mr. Strem, that the superstructure was fastened that way.

A. I seen it with my own eyes.

Q. After the house-boat was brought to Honolulu, or the hull of it, did you examine it? A. Yes, sir.

Q. Where was the house-boat at that time?

A. Laying right down here at Bishop wharf.

Q. What was the condition of that hull at that time?

A. Well, the hull was all right. Even the stove was there and a great many other things, the furniture, were still there, right on board yet.

Q. Then it was the next day after the accident?

A. Yes, after we got in the next morning.

Q. Was the hull in a seaworthy condition?

A. Sure.

(Testimony of Gus Strem.)

Q. Was that hull constructed with air-courses?

A. No; I never seen them.

Q. When you made that examination you didn't find any air-courses?

A. No, sir.

Cross-examination.

(By Mr. DUNNE.)

Q. Mr. Strem, when that tow left Pearl Harbor to come to Honolulu was the house-boat in a condition to be towed?

A. So far as my idea is concerned it was.

Q. You noticed nothing at all out of the way with it?

A. No, sir.

Q. Had it been up on the shore any?

A. Not that I know of. I have been there from the time she was towed down until she was taken away.

Q. Did you have any plank running from the boat to the shore?

A. We had a plank gang-plank.

Q. And then the house-boat was always afloat, was it?

A. Always afloat.

Q. It never was aground during those six months?

A. Not to my knowledge.

Q. You were there all the time?

A. I was right along. I was the first man there and the last that came away.

Q. And you made an examination of the hull when you got to Honolulu and found it was all right?

A. Yes, sir; I did.

Q. And your theory of this accident is that the

(Testimony of Gus Strem.)

house-boat, by reason of the rocking of the house-boat, got detached from the hull? A. Yes.

Q. When the tow was made up the tow-line was not fastened to the house at all, was it? A. No, sir.

Q. It was fastened to the hull, was it?

A. Fastened to the bitts. There were two bitts to each corner.

Q. With a bridle? A. Yes.

Q. And the tow-line was fastened to that bridle?

A. Yes.

Q. And then it was the movement, the rocking of the house-boat, that was strong enough to detach that house from the hull?

A. Yes. It loosened the fastenings of the house. That is all.

(Here the Court took an adjournment until Tuesday morning, May 24th, 1904, at 9:30 o'clock A. M.)

Tuesday, May 24th, 1904.

Morning Session.

JAS. B. AGASSIZ, being first duly sworn on behalf of the libelee, testified as follows:

Direct Examination.

(By Mr. BRECKONS.)

Q. What is your name? A. James B. Agassiz.

Q. Where do you live, Mr. Agassiz, at the present time? A. Oakland, California.

(Testimony of Jas. B. Agassiz.)

Q. State whether or not you are a member of the firm of Cotton Brothers & Company? A. Yes, sir.

Q. I will ask you whether or not the firm of Cotton Brothers & Company ever entered into a lease with Mrs. Mary K. Almy, relative to a house-boat.

A. Yes, sir.

Q. I hand you a document and ask you whether or not that is the copy of the lease, or rather, the lease, held by Cotton Brothers & Company? (Exhibiting document to witness.)

Mr. HUMPHREYS.—Is there any difference between that and the other?

Mr. BRECKONS.—Yes; the difference is that the copy submitted by me is witnessed by Mr. Canfield, and in the copy submitted by you there is no witness to the signature of Mrs. Almy. In this one there is.

Mr. HUMPHREYS.—That is the only difference?

Mr. BRECKONS.—The only difference.

Mr. HUMPHREYS.—The date is the same?

Mr. BRECKONS.—The date is the same. I say the same; I have not compared them, but if there is any difference I don't know of it.

(Lease was here offered in evidence and marked Libbees' Exhibit "A.")

The WITNESS.—A. That is a contract signed by our firm.

(Testimony of Jas. B. Agassiz.)

Q. Prior to the time the lease was entered into, Mr. Agassiz, if you know, you may state who was in possession and who had control of the house-boat described by you?

Mr. DUNNE.—Just a moment, please. We object to that, if the Court please, for the reason that it calls for a conclusion of the witness; who had control and who had possession is a matter of law to be determined by the Court upon such state of facts as the witnesses may make.

Mr. BRECKONS.—I will strike out the part “who had possession.”

Mr. HUMPHREYS.—I object to that, for the reason it is immaterial. The contract is the best evidence; and from whom he received manual possession is a matter wholly immaterial.

The COURT.—I suppose this is for the sake of the question suggested yesterday.

Mr. HUMPHREYS.—I believe we have had an arrangement with Mr. Breckons that the testimony of this witness and any other witnesses which the respondent might see proper to produce this morning, shall be heard subject to our objections, in order that the trial might not be delayed, we to have reserved our exceptions.

Mr. BRECKONS.—I desire to express my personal appreciation of the action of the Court and counsel to going on that way. (To the witness.) You may an-

(Testimony of Jas. B. Agassiz.)

swer the question. We understand counsel will attempt to take no advantage of the witness.

A. Henry Almy was in possession of the boat.

Q. Mr. Henry Almy you speak of? You may state what relation he is to Mary K. Almy, if you know.

A. Mr. Henry Almy is Mrs. Mary K. Almy's husband.

Q. At the time Cotton Brothers & Company, Mr. Agassiz, received the house-boat under this lease, from whom did they receive it?

A. They received it from Mr. Almy.

Q. The negotiations relative to the lease, such as the terms of the lease, the length of time, the conditions of the lease—with whom did Cotton Brothers deal in that respect, Mary K. Almy or her husband, Henry Almy?

A. They dealt with Mr. Almy.

Q. Do you know whether the lease was signed by Cotton Brothers & Company and where?

A. It was signed in our office.

Q. Do you know where Mrs. Almy signed the lease?

A. No; to the best of my recollection the lease was brought to me signed by Mrs. Almy, already signed, and I don't know where Mrs. Almy signed it.

Q. Who brought it to you, signed by Mrs. Almy, for your signature? A. Mr. Almy.

Q. I direct your attention to an interlineation in the lease we have just offered in evidence, an interlineation in ink, in longhand, and ask you if you know by whose direction or request such interlineation was made?

(Testimony of Jas. B. Agassiz.)

A. I believe that was made at Mr. Almy's suggestion.

Q. Up to the time the lease was finally executed, Mr. Agassiz, had you any acquaintance with Mrs. Almy whatever?

A. Up to the time the lease was made, I was acquainted with Mrs. Almy a year or two before.

Q. In connection with the lease of the house-boat, Mr. Agassiz, up to the time the lease was finally delivered to you executed, had you had any conversation with her relative to it? A. No.

Q. At the time it was executed, who was the managing partner of Cotton Brothers & Company in Honolulu? A. I was.

Q. Was there any other member of the firm here?

A. No, sir.

Q. After the lease was executed and you entered into possession of the house-boat under the terms of the lease, where was the house-boat kept? Where did she stay?

A. The house-boat was kept in Pearl Harbor.

Q. I want you to describe to the Court, Mr. Agassiz, just about where she was kept and how kept, in your description paying attention to whether she was aground or afloat.

A. She was kept near the place they call the "shark-pen," in Pearl Harbor, and she was moored near the beach, probably a few feet away from the beach, and had two anchors out to hold her away from the beach

(Testimony of Jas. B. Agassiz.)

and two lines on the shore to steady her and prevent her swinging back and forth.

Q. Now, during the time she was kept there you may state to the Court how frequently you saw her, Mr. Agassiz.

A. I saw her every day, because I was living on her, excepting probably once a week I would come to Honolulu for one or two days and go right back there. I was living aboard her.

Q. During the time she was there you may state whether or not any part of her was ashore or all afloat. What were the facts about that?

A. Afloat all the time.

Q. I desire you to take the photograph, Mr. Agassiz, introduced by the libelant in this case and to indicate to the Court, if you will go up to his Honor there, how she was anchored or how she was moored, showing the places, and if there are any hooks there by which she was moored, showing the Court that.

(The witness here walked up to his Honor and illustrating his remarks by references to the photograph in question, made the following statement:)

The house-boat was moored by two anchors. This is one (pointing), and there was one (pointing), which held her from coming up onto the beach; and then there were two lines—that is one of the lines laying down in the water (pointing), which was made fast to a stake in the beach. The stake must be further back. On the other side there was an old anchor built into the bank.

(Testimony of Jas. B. Agassiz.)

That does not show in the photograph. The anchor was built into the bank. I suppose the sand must have covered it up. That is the only part of the rope showing (pointing), but, anyway, there were two ropes out, one on each side, that prevented her from swinging back and forth on the bank. Then there were two anchors out on the out-shore end, farthest back from the shore, to hold her away from the shore, and they were separated far enough to keep the other end from swinging astern.

The COURT.—How far did you say she was from the beach?

A. Well, the gang-plank we had extended to the beach was twenty-six feet long and just reached the bank at high tide. This plank here (pointing) is twenty-six feet long; so she was practically twenty-six feet from the low-tide line.

The COURT.—Q. How much does the tide rise and fall?

A. I don't think it rises and falls more than two feet.

The COURT.—Q. That was taken at low tide, was it? (Referring to the photograph.)

A. It seems to have been; yes. The stakes here would be high tide.

Mr. BRECKONS.—Q. Now, describe where the boat was anchored and how she lay. I will ask you whether

(Testimony of Jas. B. Agassiz.)

or not at low tide any part of that boat touched the beach? A. No, sir.

The COURT.—Q. What do you mean by that, Mr. Breckons; do you mean whether it touched the visible beach or whether it was aground?

Mr. BRECKONS.—Q. At low tide, you may state whether or not any part of that boat was aground.

A. No, sir; it was not aground at all.

Q. Mr. Agassiz, were you on the tug the day the house-boat was brought to Honolulu? A. No, sir.

Q. How long before that had you left Pearl Harbor?

A. I think I left the day before. I left in the morning.

Q. Prior to the time you left Pearl Harbor—by the way, what day was that, do you remember?

A. I don't remember the day.

Q. Was it the day before you brought up the house-boat?

A. I left in the morning, and I think the house-boat was towed up the next afternoon. It may have been the second afternoon.

Q. Prior to that time you may state whether or not you had any conversation with Mr. Almy, the husband of the libelant in this case, relative to the disposition of the house-boat. Answer that yes or no.

A. Yes, I had a conversation.

Q. And how long before the house-boat was brought up was it that you had that conversation?

(Testimony of Jas. B. Agassiz.)

A. Well, I don't recollect exactly. I think it was about two months.

Q. Now— (To Mr. Humphreys.) I suppose this will go in subject to the objection?

Mr. HUMPHREYS.—I understand we are reserving our exceptions.

Mr. BRECKONS.—(Continuing question.) What was that conversation?

A. Mr. Almy asked me when we would be through with the house-boat, and I told him I thought we would be through with her in about two months; that would make it either July or August. I think I said we would be through in July. And he then asked me whether I would tow the boat to Honolulu for him, and I said yes, I would tow her back to Honolulu with my own plant as a favor to him, but I would not take any responsibility on the tow. And he said: "All right, when you get through with the boat in Pearl Harbor will you tow her to Honolulu for me," and I said "yes."

Q. When you left, Mr. Agassiz, on the third of August, or, rather, on the day before the house-boat was towed up, if you don't remember the dates, you may state whether or not you left any instructions with your men relative to the bringing up of the house-boat to Honolulu?

A. Yes; I told Mr. Strem, who was in charge of everything on the beach there at the time, to have the tow made up in a certain way, and to bring the tow

(Testimony of Jas. B. Agassiz.)

when the water was perfectly calm, as near as possible to being calm.

Q. To go back to one matter, Mr. Agassiz, about Mr. Almy's handling of this house-boat—prior to the time you leased her, who lived on board?

A. Mr. Almy lived on board and I lived on board and Mr. Thompson.

Q. What was Mr. Almy doing on board the house-boat prior to the time you leased it?

A. He was running a boarding-house.

The COURT.—Q. He was running what?

A. He was running a boarding-house; boarded my men.

Q. And do you remember the circumstance of Mr. Almy's arrest by the Territorial authorities?

A. I remember it; yes; but I was not there at the time he was arrested.

Q. How long was that before you entered into the lease?

A. I couldn't say exactly; I think inside of a month.

Q. Do you know from any conversation with Mr. Almy why he was arrested?

A. He was arrested—in a conversation with him—yes, I know.

Q. Why?

A. He was arrested for selling liquor.

Q. Where? A. On the boat-house.

Q. Mr. Agassiz, the day before the house-boat was

(Testimony of Jas. B. Agassiz.)

brought up to Honolulu you may state whether or not any scows were brought up.

A. Yes, sir; there were scows brought up.

Q. And of Cotton Brothers & Company's scows what remained after that date; what scows?

A. What scows remained in Pearl Harbor?

Q. Yes.

A. I don't think there were any scows left. I think that was the last tow.

Q. Do you know what was brought up with the house-boat? A. Yes, sir.

Q. How do you know?

A. Because I gave instructions to Mr. Strem to make up the tow before I left there.

Q. Well, after the arrival of the tug in Honolulu, the tug which had the house-boat in tow, did you see what scows she had brought up?

A. No; I went away on the "Alameda" that morning. I didn't see the scows.

Q. Do you know what scows were brought up that day? If you know, why tell what was brought up.

A. I know, yes.

Q. What was brought up?

A. The tow was made up before I left. There were two water scows brought up and also a row-boat, I think, a little pontoon boat.

Q. Now, Mr. Agassiz, I want to ask you the relative sizes of the house-boat and any of the scows that were brought up.

(Testimony of Jas. B. Agassiz.)

A. The size of the hull of the house-boat—well, I could not state that definitely, because I never measured it; but I think she is about twenty by probably thirty-two, or something like that. And you want the size of the—

Q. (Int.) Which was the larger in that tow as you saw it made up—which was the largest vessel?

A. The house-boat was the largest vessel in the tow.
(No cross-examination.)

Mrs. MARY K. ALMY, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BRECKONS.)

Q. Mrs. Almy, I believe you are the libelant in this case? A. Yes.

Q. I will ask you, Mrs. Almy, in so far as you were concerned, when the lease between you and Cotton Brothers & Company terminated?

A. When it terminated?

Q. Yes.

A. Well, they took it for six months with the privilege of renting it from month to month after that.

Q. But up to what time did you receive rent under that lease; that is the question?

A. I received my last rent in July.

Q. And the last rent you received, then, as I understand it, was for the month of July?

(Testimony of Mrs. Mary K. Almy.)

A. For the month of July.

Q. And you received nothing for the month of August? A. Nothing.

Q. There was nothing due?

A. Well, I should think it would be due because they had not turned it over.

Q. But, under the terms of the lease, Mrs. Almy, the house-boat was to be delivered at Pearl Harbor, returned to you?

Mr. HUMPHREYS.—We object to that, if the Court please. The lease speaks for itself.

Mr. BRECKONS.—Let me finish my question. Under the terms of the lease the house-boat was to be delivered to you at Pearl Harbor? I will ask you whether you know anything at all about why it was brought, or attempted to be brought, to Honolulu?

A. Well, for the simple reason that they towed it down, and I took it for granted they would return it here.

Q. You say for the simple reason they towed it down there, and you took it for granted it would be returned here?

A. Honolulu.

Q. So that the bringing of the house-boat to Honolulu, Mrs. Almy, was with your knowledge, was it?

A. Yes, I knew it.

Q. And under the assumption by you that it would be returned to Honolulu under the terms of the lease?

A. Yes.

(Testimony of Mrs. Mary K. Almy.)

Q. And you knew it was coming here?

A. Yes, I knew it was coming up here.

Q. This is a letter signed by you, Mrs. Almy, I believe (showing letter to witness). A. Yes.

Q. So that you were in communication with Cotton Brothers & Co. relative to the bringing of the houseboat to Honolulu and requested them, Mrs. Almy, to let you know where they would deliver it to you; is that correct?

A. I asked them to inform me when they would bring it up.

Mr. BRECKONS (To the Court).—I offer this in evidence.

Mr. HUMPHREYS.—No objection to this.

(The letter offered in evidence was a letter dated June 7th, 1903, addressed to Messrs. Cotton Brothers & Co., and signed by Mrs. Mary K. Almy, and upon being received in evidence was marked Libelees' Exhibit "B.")

Q. I hand you a paper, also, Mrs. Almy—I am mixed up here. Mrs. Almy, I ask you whether that (showing letter to witness) was also a communication sent by you to Cotton Brothers & Co? A. Yes.

Mr. BRECKONS (To the Court).—I offer this in evidence.

Mr. HUMPHREYS.—No objection.

(The letter offered in evidence as above set forth was a communication dated July 29th, 1903, addressed to

(Testimony of Mrs. Mary K. Almy.)

Messrs. Cotton Brothers & Co., and signed by Mrs. Mary K. Almy, and was marked Libelees' Exhibit "C.")

Mr. BRECKONS.—Now, Mrs. Almy, referring to your letter of June 7th, which has been introduced in evidence, I will ask you whether you got a response to that, and also whether this is the response? (Showing letter to witness.) A. Yes.

Mr. BRECKONS (To the Court).—I offer this in evidence.

(The letter last offered in evidence was a communication dated Honolulu, June 9th, 1903, addressed to Mrs. Mary K. Almy, and signed by Cotton Brothers & Company.)

Cross-examination.

(By Mr. DUNNE.)

Q. A portion of the correspondence between you and the respondents has been received in evidence. I will ask you to look at this letter and state whether you received this also from Cotton Brothers & Company?

A. Yes, sir.

Mr. BRECKONS.—No objections.

Mr. DUNNE.—(Reading:)

Honolulu, T. H., August 5, 1903.

Mrs. Mary K. Almy, Honolulu.

Dear Madam: We beg to inform you that your house-boat, which, at the request of Mr. Almy, in your behalf, we undertook to tow without compensation from Pearl

(Testimony of Mrs. Mary K. Almy.)

Harbor to Honolulu, suddenly filed with water and careened over on its side without warning on the way up. We anchored the boat, which was still afloat, and as soon as possible towed the submerged scow into Honolulu Harbor. The house on the scow is demolished, and we have saved as much of the superstructure as we could, and the scow and everything rescued is now at the end of the mauka Bishop Estate wharf. We have a man in charge, but must decline to take responsibility for the boat, which is now subject to your direction. We remain,

Very truly yours,

(Sgd) COTTON BROS & CO.

Per CANTIN.

(The above letter was then offered and received in evidence and marked Libelant's Exhibit No. 3.)

Q. In this letter there is this statement: "We beg to inform you that your house-boat, which, at the request of Mr. Almy, in your behalf, we undertook," etc., I will ask you if you ever directed Mr. Almy, in your behalf, or otherwise, as stated in that letter?

A. I did not.

That is all.

Redirect Examination.

(By Mr. BRECKONS.)

Q. In the answer you gave in response to the question put by counsel, I desire to ask you whether, prior to the time the lease in question was entered into—

(Testimony of Mrs. Mary K. Almy.)

rather, who made the negotiations, yourself personally, or your husband?

A. Mr. Savidge drew up the papers and they were brought home to me to look at and sign my name to. Mr. Almy delivered them.

Q. Up to that time you had entered into no negotiations yourself personally with Cotton Brothers & Company? That was all done by your husband, was it not?

A. No, it was not.

Q. With what member of the firm did you deal, Mrs. Almy? A. About the lease?

Q. Yes.

A. Well, Mr. Almy, of course, talked with them and told them for me.

Q. And prior to that time you had been in possession of the house-boat, yourself or Mr. Almy?

A. I had rented the house-boat to Mr. Almy.

Q. So that Mr. Almy had possession of the house-boat by virtue of a lease from you?

A. No; we didn't enter into a lease. I simply rented him the house-boat, he paying me so much money for it.

Q. And under that arrangement he was the man who had the possession and control of the house-boat?

A. Well, I was in possession of it down there.

Q. Were you ever in possession of it, yourself, personally?

A. No, I was not in possession; always Mr. Almy took care of it for me. I was on the house-boat when he left, when he left and came ashore.

(Testimony of Mrs. Mary K. Almy.)

Q. So far as looking after her, Mrs. Almy, the care of it, to see where she was, you left that to your husband, he being a man and you a woman and not caring to have possession?

Mr. HUMPHREYS.—I object to that.

Mr. BRECKONS.—If they object to that line of questioning I withdraw the question.

Recross-examination.

(By Mr. DUNNE.)

Q. Who collected the rent?

A. I did, Mr. Dunne.

Mr. BRECKONS.—We will make an admission that every month Mrs. Almy collected the rent.

JAMES A. LYLE, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. What is your business, Mr. Lyle?

A. Superintendent of the Marine Railway, Honolulu.

Q. How long have you been engaged in that business?

A. I have been engaged in it for the last four years, superintendent of the Marine Railway, and carrying on ship work there ever since the railway was built.

Q. Previous to that time what were you doing?

A. Working on ship work on the coast.

(Testimony of James A. Lyle.)

Q. What do you mean by ship work?

A. That is my trade; I have served in that line.

Q. Do you mean shipbuilding?

A. Shipbuilding, yes.

Q. Did you ever see the house-boat known as the Almy house-boat?

A. Yes, I have.

Q. Do you remember seeing it after the accident to it?

A. Yes, I went over to look at her.

Q. Who asked you to go there?

A. Nobody.

Q. What was the purpose?

A. Just curiosity; that is all.

Q. What did you do when you went there?

A. I went there to see how the house went off her.

Q. Did you make an examination of her?

A. Yes; I looked her over.

Q. Kindly state to the Court what the condition of the hull was at that time?

A. Well, the hull was all right, as far as the hull was concerned only the house part of it went over the side; and what I wanted to find out was how this top went off the scow without hurting the scow, and I found out the reason; that is what I went there for.

Q. What do you mean by saying the hull was all right?

A. The hull was not injured any. In pumping out the water it could be used.

Q. Any leak in the hull?

A. No leak in the hull at all, perfectly tight.

(Testimony of James A. Lyle.)

Q. What was your opinion, as an expert boat-builder, as to how that accident could have happened?

Mr. DUNNE.—We object to that on the ground it is irrelevant and incompetent and immaterial and without foundation, and under the circumstances of the case not a proper subject matter as expert testimony by this witness.

The COURT.—Have you a hypothetical question to put to the witness? There are no circumstances that he is supposed to be acquainted with so far.

Mr. JUDD.—I withdraw the question.

Q. What did you find on the deck of the hull?

A. On the deck of the hull?

Q. Yes.

A. There was nothing on the deck of the hull.

Q. Was it swept clean?

A. Yes, they had taken the stuff that was on it off and put it on the wharf and the men were working on it at the time I was there.

(No cross-examination.)

Mr. H. N. Almy, called on behalf of the libelees, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Almy, you have heard the testimony of Mr. J. B. Agassiz relative to a certain alleged conversation had with you, the substance of which was that you

(Testimony of H. N. Almy.)

asked him to tow the house-boat to Honolulu for you and he said he would do so as a favor to you but without responsibility to him. Did any such conversation as that ever take place between you and him?

A. No.

Q. What was said?

A. I met him on the street and I remember I asked him how soon they expected to be through. He said he didn't know. I then asked him if he thought they would be through by the first of July. He said he hardly believed they would; and that was the substance of the conversation.

Q. Was anything said, directly or indirectly, in the conversation about towing up your house-boat from Pearl Harbor to Honolulu as a favor to you and without responsibility to him? A. No.

Q. Now, have you at any time had any conversation with Mrs. Almy on this subject matter of bringing that house-boat up as a favor to you and without responsibility to the towing people? A. No.

Q. Did Mrs. Almy at any time ever authorize or say to you that you could make any contract of that character with Mr. Agassiz or the towing people, or anybody else? A. No, sir.

That is all.

Cross-examination.

(By Mr. BRECKONS.)

Q. Mr. Almy, when did you first know that the house-

(Testimony of H. N. Almy.)

boat was to be brought to Honolulu, rather than left at Pearl Harbor?

A. When did I first know it was coming up here?

Q. That it was to be brought up here and not left at Pearl Harbor, as provided in the lease: When did you first find out?

A. I think on the day before the house-boat came up.

Q. Who told you? A. Mr. Leonard?

Q. Mr. Leonard, with Cotton Brothers & Company?

A. He was the time-keeper.

Q. That was the first you heard about its coming to Honolulu? A. Yes.

Q. Who negotiated the lease?

A. How do you mean?

Q. Who fixed up the terms of the lease for Mrs. Almy?

A. Mr. Agassiz made me the offer and I submitted it to Mrs. Almy and then I told Mr. Agassiz afterwards that Mrs. Almy accepted his proposition. He asked me then to have a lease drawn up.

Q. You are the husband of the libelant in this case, Mrs. Almy's husband? A. Yes.

Q. And you were informed the day before by Mr. Leonard that it was to be brought up to Honolulu?

A. I was.

Q. Did you make any protest?

A. No.

Q. Why?

(Testimony of H. N. Almy.)

Mr. HUMPHREYS.—I object as immaterial why he made no protest.

(Objection withdrawn.)

Mr. BRECKONS.—Why?

A. Well, I had no objection to make.

Q. Now, that is the first time you knew that, the day before? A. Yes.

Q. Did your wife know anything of it before?

A. She wrote a letter to Cotton Brothers & Company which they did not answer.

Q. The first time you knew that Mrs. Almy knew that the house-boat was to be brought to Honolulu was the day before it was brought up?

A. The first time we had actual knowledge of it; yes.

Q. Had no idea before that time, either you or Mrs. Almy, whether it was to remain at Pearl Harbor or be brought to Honolulu?

A. I supposed they would bring it to Honolulu; they took it away from Honolulu.

Q. So that up to the day before the house-boat was brought to Honolulu, Mr. Almy, your knowledge of what was to be done with her, and Mrs. Almy's knowledge, so far as you know, as to what was to be done with her, was confined simply to a supposition that as she had been taken to Pearl Harbor from Honolulu she would be returned here?

Mr. HUMPHREYS.—Just wait a moment. He asks not only for the witness' opinion in regard to the return

(Testimony of H. N. Almy.)

of this house-boat, but the opinion of Mrs. Almy, so far as he knew. Now, then, even if he could have learned, if the Court please, of Mrs. Almy's opinion about it, it would be entirely immaterial.

Mr. BRECKONS.—I strike out the Mrs. Almy part of the question.

Q. Now, what do you say?

Mr. HUMPHREYS.—I submit the question as put is unintelligible.

(Last question read by reporter, omitting therefrom the reference to the opinion of Mrs. Almy.)

Mr. BRECKONS.—I submit it is intelligible.

The COURT.—Yes, it is intelligible.

A. Well, does he say up to the day before?

The COURT.—Yes.

A. Before I was told on the street?

The COURT.—Yes.

A. Why, I think so; yes.

Mr. BRECKONS.—Mr. Almy, you looked after your wife's interests in the house-boat? Did you manage it for her?

A. No; of course there was not much to look after. The boat was leased and that was the end of it. Mrs. Almy collected the rents.

Q. When you heard she was to be brought to Honolulu, I suppose you informed your wife?

(Testimony of H. N. Almy.)

A. Yes, that Monday.

Mr. HUMPHREYS.—I move the last question and answer be stricken out. It is immaterial what he informed his wife. I object to it on the ground that it calls for information from the husband to the wife and under our statute that is privileged.

The COURT.—It must be stricken out if objected to.

Mr. HUMPHREYS.—We object to it.

The COURT.—Strike it out.

Mr. BRECKONS.—We take an exception, your Honor.

Redirect Examination.

(By Mr. DUNNE.)

Q. You stated, Mr. Almy, that to one of those letters your wife wrote to Cotton Brothers she never got an answer to. Do you think you could identify that letter?

A. I could.

Q. Is that the letter? (Showing letter to witness.)

A. Yes.

Mr. DUNNE (To the Court).—Referring to Libelee's Exhibit "C."

Q. (To the Witness.) In Libelant's Exhibit No. 3, the letter dated August 5th, 1903, this language appears: "We beg to inform you that your house-boat which at the request of Mr. Almy, in your behalf, we undertook to tow without compensation"—I ask you whether you ever made any request to Cotton Brothers & Company

(Testimony of H. N. Almy.)

on behalf of your wife or otherwise to tow the house-boat to Honolulu without compensation?

A. I did not.

Recross-examination.

(By Mr. BRECKONS.)

Q. You stated you were acquainted with that letter? You saw it? A. I saw that letter.

Q. In fact all letters in connection with the house-boat you were fully acquainted with?

A. Yes, sir; I think Mrs. Almy showed them to me.

The COURT.—Q. It appears in evidence that you remained on this house-boat during the time it was leased, keeping and boarding the men?

A. No, sir; that was before, a month before.

Mr. HUMPHREYS.—The statement of Mr. Agassiz was that Mr. Almy was running a boarding-house, boarding his gang of men. Subsequently, Mr. Agassiz rented the house-boat from Mrs. Almy and conducted this boarding-house himself; and afterwards this lease was made, after Mr. Almy ceased to conduct the boarding-house himself.

The COURT.—There is one thing not clear to my mind. Mention is made about the company taking this boat down to Pearl Harbor and it was expected they would bring it back. It was taken down some time before the lease apparently. How long?

A. About three months. They went down; they towed her down there and after the dredger sank, the

(Testimony of H. N. Almy.)

big dredger, they concluded they would prefer to run the boarding-house themselves, and then this lease with Mrs. Almy was made. Prior to that time they had an agreement with me to run their gasoline launch and also run the boarding-house.

The COURT.—Q. And was the house-boat taken down there with that in view?

A. It was taken down entirely for their work. It was taken down there for their work and was never used for anything else, and she was a new boat.

The COURT.—Q. And you kept a boarding-house there? A. Just for their men.

The COURT.—Q. Under an agreement with Cotton Brothers?

A. Under an agreement with Cotton Brothers. That was prior to July 1st, when this lease was made out.

Mr. BRECKONS.—Q. So that the tow down there was not under this lease? They took her down for you and you used the house-boat for a boarding-house? That was three months before the lease was entered into, wasn't it? A. Yes.

Q. And the lease was not made at the time she went down? A. No.

Re-redirect Examination.

Mr. DUNNE.—One matter, before leaving the stand. You say she was fitted up for the work of Cotton Brothers? What do you mean?

(Testimony of H. N. Almy.)

A. Well, we had intended going to Pearl Harbor ourselves to live in this boat and she had our furniture in, and Mr. Agassiz wanted to rent the boat of Mrs. Almy. I talked with Mrs. Almy and she preferred not to rent the boat, because she thought they would disfigure her. Afterwards a proposition was made for me to go down with the boat and we took our furniture out here and she was fitted up with bunks upstairs and also downstairs with tables and chairs and everything, bedding and so on, and blankets and everything for the accommodation of forty men. That was done here in Honolulu.

Q. I will ask you if in the month of August, 1903, there were any means or appliances at the place at which she was at Pearl Harbor to restore her to the former condition, to remove these bunks and put her into the condition she was in before she was leased to Cotton Brothers?

Mr. BRECKONS.—I object to that, as not proper and as not proper redirect testimony.

The COURT.—I will overrule your objection pro forma.

Mr. DUNNE.—Q. Will you explain that?

A. Why, no; there was no means of refitting her, painting her, or hauling her out, or anything, at Pearl Harbor, and that had to be done. This interior work had to be taken out and this boat renovated before our

(Testimony of H. N. Almy.)

furniture, which was stored here, could be replaced for our own use.

Q. Could that be done in Honolulu?

A. Could that be done in Honolulu?

Q. Could the renovation of this boat be done at Honolulu—the renovation of the boat?

A. Certainly it could be done here. That is just what I was saying.

That is all.

Re-recross-examination.

(By Mr. BRECKONS.)

A. And so was that the reason, Mr. Almy, while in making the negotiations for the lease for Mrs. Almy you agreed that it should be returned at Pearl Harbor?

A. I didn't make any such negotiations?

Mr. ALLAN DUNN, called on behalf of the libelant, in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Dunn, do you remember the witness, Burt Wheeler, who was on the witness-stand in this case?

A. I do.

Q. Shortly after the injury to this house-boat did you see Mr. Burt Wheeler? A. I did.

Q. Where?

A. I was riding home to my evening meal on the

(Testimony of Allan Dunn.)

street-car, the Rapid Transit car; I was living at the Melrose. I was sitting next to a friend who had read in the Sunday paper that Mr. Hobron and myself had been on the "Glays." He said to me—

Mr. BRECKONS.—No, no, no.

Mr. DUNNE.—Did you have a conversation with this man concerning the house-boat? A. I did.

Q. Where was the witness Burt Wheeler sitting?

A. Behind us.

Q. Behind you. While having that conversation with your friend did Mr. Wheeler inject himself into the conversation?

Mr. BRECKONS.—I object to the question as not rebuttal, as leading and incompetent and irrelevant. On this proposition the witness can be asked simply at such and such a time and such a place you may state whether the witness Burt Wheeler said so and so.

Mr. DUNNE.—Q. On that occasion, on that car, under the circumstances that you have described, I ask you if the witness Burt Wheeler did not state that Cotton Brothers—referring to this tow—had made a nice mess of it; that it was a bum job of towing the house-boat between the tug and the scows; and that he was not surprised that the house-boat was wrecked; that he was on the tug at the time; that the men on the house-boat told him that they had been calling to the tug for fifteen minutes before anything was done towards helping them and that they said the tug-men could not have

(Testimony of Allan Dunn.)

been watching their tow; and that those on board the house-boat had been drinking whisky and were not watching the house-boat's condition; and, further, that some of this whisky was saved? A. He did.

Cross-examination.

(By Mr. BRECKONS.)

Q. You were acquainted with Mr. Wheeler?

A. By sight.

Q. Never spoke to him before? A. Never.

Q. So he was an absolute stranger?

A. He was.

Q. And did you know he had never seen you before?

A. So far as I know.

Q. Was he drunk or sober? A. Sober.

Q. And outside of communicating with you, an utter stranger, on the delinquencies of his employers, he gave no other evidences of insanity?

A. None except loquacity.

Mr. DUNNE.—That is the case of the libelants.

I hereby certify that the foregoing is a full, true and correct transcript of the proceedings had and testimony taken on the trial of the above-entitled cause, as transcribed from my stenographic notes taken on the trial thereof.

GEO. P. THIELEN,
Official Reporter.

[Endorsed]: Title of Court and Cause. Filed June 9th, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, Vol. 3, Page 69, Friday, June 17, 1904.

[Title of Court and Cause.]

Order Extending Time to File Briefs.

Now, upon motion of Mr. J. J. Dunne, of proctors for the libelant, it is ordered that each side may have ten days additional time within which to file briefs herein.

From Minutes U. S. District Court, Vol. 3, Page 79, Monday, June 27, 1904.

[Title of Court and Cause.]

Order Extending Time to File Briefs.

Now, upon motion of Mr. J. J. Dunne, of counsel for the libelant, it is ordered that each side have ten days additional time within which to file briefs herein.

From Minutes U. S. District Court, Vol. 3, Page 156, Thursday, September 15, 1904.

[Title of Court and Cause.]

Judgment.

This above-entitled cause having been previously tried, argued and submitted, and the Court being fully advised in the premises, this day rendered its written decision herein ordering that a decree be entered in favor of the libelant above named in the sum of eighteen hun-

dred and fifty dollars and costs. To which decision counsel for the libelee excepted and gave notice of appeal.

In the District Court of the United States, in and for the District and Territory of Hawaii.

Special September Term, A. D. 1904.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

A. S. HUMPHREYS and J. J. DUNNE, Proctors for Libelant.

R. W. BRECKONS and ATKINSON, JUDD & MOTT SMITH, Proctors for Libelees.

Decision.

The libelant has brought this libel for damages for the loss of her house-boat, which was wrecked on the open sea while the libelees were attempting to tow it from Pearl Harbor to the Port of Honolulu, August 4th, 1903. The libel alleges that the accident was due to the carelessness and negligence of the libelees, and sets

forth in particular the following conduct on their part as showing such carelessness and negligence: First: The house-boat was placed in the same tow with two laden scows, all arranged in what is called a tandem tow, in which the house-boat followed the towing steamer and was followed by the two scows, one after the other, which, it is alleged, was, considering the state of the weather and the sea, and the nature of the construction and the plan of the house-boat, an improper and defective arrangement which was a proximate cause of the accident. Second: The careless and negligent selection by the libelees of the time in which the tow was attempted in relation to the conditions of wind and sea then prevailing which was a proximate cause of the said loss and damage. There was also a general allegation of carelessness and negligence in relation to the manner in which the tow was operated, but there being no evidence on this point of any special significance, I shall make no further allusion to it.

The libelees in their answer say in substance that they leased the house-boat from the libelant from January 1st, 1903, to July 29th, 1903, by a written lease, a copy of which is attached to the answer; that during all the times mentioned in the libel, H. N. Almy—the husband of the libelant—was in charge and control of the house-boat and acting as her agent in regard to the same; that the value of the same was, up to the 4th of August, 1903, \$1,500; that pursuant to the lease it became their duty at the termination thereof, on the 29th of July, 1903, to deliver the house-boat to libelant at Pearl Har-

bor, and that she was notified of such termination that she might take possession; that at such termination of the lease she requested the libelees to remove the house-boat to the port of Honolulu for her convenience; and that they thereupon agreed to do so but under the express stipulation that they should not be responsible for any loss or damage of or to the house-boat that might occur during such removal, and that pursuant to such agreement they proceeded to remove the same from Pearl Harbor to the port of Honolulu on the 4th of August, 1903. They admit that two laden scows formed a part of the same tow and allege due care and good seamanship in the construction thereof, and that a light breeze was blowing, the sea was smooth and there was no appreciable swell; that when the tow was near to Kalihi Channel the house-boat suddenly went over on one side and thereupon the libelees towed the same into shallow water and anchored her, and then proceeded to Honolulu with the scows and the persons who had been on the house-boat; that after reaching Honolulu the towing steamer returned to the house-boat and towed her to the port of Honolulu; that the turning over of the house-boat was not due to carelessness or negligence on the part of the libelees but, as they were informed and believe, was due to the fact that the house-boat was not properly built into the scow but was simply tacked thereto with ten-penny nails which became gradually loosened from the "rocking of the scow." They further allege that at no time after the 29th of July, 1903, were they or either of them in the sole pos-

session or control thereof under or pursuant to the terms of said lease. This position is, however, modified by the brief of counsel for libelees, in which (page 10) they say "as a matter of accommodation to the owner of the house-boat, the lessees waived their right under the lease to have the boat returned to Pearl Harbor, and undertook to deliver the house-boat at Honolulu." They further aver that the house-boat was not a total loss and that libelant has not suffered a loss of \$2,500 as alleged in the libel.

The lease, made a part of their pleadings by the libelees, is not disputed by the libelant. It is dated January 1st, 1903, and was executed by the parties to this suit. The term of the lease is six months with the privilege of extension from month to month for not over three months more. The lessees, the libelees in this case, covenant to pay the rent; that they will not remove the house-boat from Pearl Harbor; that they will provide proper moorings; that they shall be liable for all damages to the house-boat from stranding or wreck; that in case of total loss of the house-boat they will pay to the lessees two thousand five hundred dollars, and that at the termination of the lease they will return her in good order and condition, ordinary wear and tear excepted, but withholding themselves from liability from damage by fire.

The claim of the libelees in their answer, that at the alleged termination of the lease on July 29th, they notified libelant of such termination, and that thereupon she requested them to deliver the house-boat at the port

of Honolulu, and that they agreed to do so on the understanding that such removal to Honolulu should be at her risk, is modified by their testimony, in which Mr. Agassiz, one of the libelees, testifies that about two months before the wreck of the house-boat, Mr. Almy asked him if, when he was through with her he would tow her up to Honolulu for him, and he, Mr. Agassiz, agreed to do so as a favor to him, but without taking "any responsibility of the tow," which was assented to by Mr. Almy. Mr. Almy, in rebuttal, denied that any such conversation or agreement had taken place, admitting, however, that he had asked Mr. Agassiz sometime before July, when he expected to be through with the house-boat.

During the hearing and in their brief, the counsel for the libelant repeatedly referred to the lease of the house-boat as containing provisions requiring her to be returned to the owner at Pearl Harbor at the termination of the lease. There is no such provision. The lease recites that at the date of its execution the house-boat was lying at Pearl Harbor, and being silent as to the place of its return to the owner, the implication would be that it would be returned at Pearl Harbor, unless some other arrangement should be subsequently made, which was the case.

The defense may be stated briefly as follows: There was no negligence or carelessness on the part of the libelees in relation to the attempted removal of the house-boat to Honolulu; the wreck of the same was caused by its own inherent weakness, whereby it was un-

able to stand the "gentle rocking incident to the towing"; that the service attempted to be performed by the libellees being gratuitous, or, as they describe it, "a matter of accommodation to the libelant," they cannot be held to "a high degree of care and prudence"; and the value of the house-boat at the time of the accident was only fifteen hundred dollars.

Much attention was given at the trial to the question of the construction of the tow, the opinion of expert witnesses being much divided. The following opinions were, however, favorably impressed upon my mind from this evidence, to wit: On the part of the libelant, the weaker vessel should come last in the tow, because she would be more protected by the tow ahead of her, and because in the intermediate position, with the towing steamer pulling ahead and the scows dragging behind, there would be more strain; also it would have been safer to tow the house-boat by itself, because of the greater ease of handling one vessel in tow rather than several, and of favoring her in a seaway; on the part of the libellees; a small craft towed behind a large one will tend to steady it like a rudder.

There was such contradictory evidence as to the size of the scows which were towed behind the house-boat, and whether or not they were laden, in spite of the fact that the answer admits that they were laden scows. The weight of evidence as to their size supports the contention that they were small scows.

I attribute the disaster mainly to the rolling of the house-boat caused by the swell of the sea, and not to

“the gentle rocking incident to the towing,” as the counsel for the libelees contend. If the seams of the house-boat scow had opened from her having lain aground at one end for six months or more, as Mr. Scott and Mr. Wheeler, two of the libelees’ witnesses, said had happened, and she had taken in some water in consequence thereof after getting to sea, the presence of such water in her hull in any considerable quantity would inevitably have aggravated any tendency to roll caused by the wave. In the opinion of these two witnesses this was the proximate cause of the accident.

Mr. Dunn, a witness for the libelant, testifies to open air-courses in the hull of the house-boat just below the platform on which the superstructure was placed. He thinks they were two or three inches wide and running nearly across the width of the hull. This testimony is denied by several witnesses for the defense, but as their testimony is negative in character, it does not overthrow the positive testimony of Mr. Dunn.

There is no doubt that, after the accident to the house-boat, there was a considerable quantity of water in the hull, which would have been a proximate cause of the disaster if it had been present before that took place. If this water entered the hull through the air-courses or otherwise at the time of the accident when the house-boat was in a partially capsized condition, its presence had no significance as to the questions at issue. The evidence is insufficient to prove that the water was present early enough to have had any influence in causing the injury.

Much attention was given by the defense at the trial to the theory that Mr. Almy was the agent of the libelant, and therefore he had authority to contract with libelees to tow the house-boat to Honolulu at her risk. I understand from the brief of counsel for libelees that this point is now waived, that is, they now admit "that one may not make a contract relieving himself from the result of his own negligence," and rely on their theory of the law, that in a case of a gratuitous bailment a high degree of care and prudence is not required by any principle of law. This being the case it becomes unnecessary to consider the question of Mr. Almy's authority as agent for libelant.

I find the facts in relation to this point to be, that under the lease the libelees were entitled to deliver the house-boat at the end of the lease to the lessor at Pearl Harbor; that a subsequent agreement was entered into between the parties, changing the locality of delivery to Honolulu without charge, the allegation of the answer that after July 29th, the house-boat was not in the possession of the libelees under the lease, being unsupported by evidence and inconsistent with the facts of the case.

Parsons has the following in regard to responsibility in the case of a gratuitous bailment.

"It may be gathered from the cases and from obvious reasons, that where the work to be done requires peculiar skill and care and the mandatary undertakes it in such way as to be bound to go through with it, the want of the required skill and care would be negligence enough": 2 Parsons on Contracts (6th ed.) 115.

The law is clear that although one undertaking to tow does not assume the obligation of an insurer nor the liability of a common carrier, yet he must exercise that degree of care and skill which the circumstances of the weather and the condition of the tow reasonably require for the safe conduct of the enterprise, and his liability for negligence is not dependent on his towage agreement, but may be based on tort.

“Liability of a tug for damage caused by negligent towage, if founded on tort arising out of a duty imposed by law and independent of any contract made or consideration paid for the towage.” *The Temple Emery*, 122 Fed. Rep. 180, 181; *The John G. Stevens*, 170 U. S. 113, 124.

Did the libelees exercise the care and precautions that the circumstances of weather and sea and the unusual and inherent weakness of the house-boat, as a craft in the open sea, required?

“No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business.” *The Nitro-Glycerine Case*, 82 U. S. 537.

Was the disaster which destroyed the house-boat unavoidable? *The Nitro-Glycerine Case* above cited offers the following standard of carelessness in such matters:

“The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.”

I am of the opinion that the accident was not una-

voidable, and that the libelees failed in exercising the care and caution which the circumstances reasonably required, and that the damage to the house-boat was due to such failure. Mr. Agassiz, one of the libelees, was fully acquainted with the character of the house-boat, having lived in her, and testified that she was constructed and suitable for transportation on inland waters only, and not suitable for traffic on the ocean, and that the studding of the house part was attached to the scow by means of nails about the size of tenpenny nails. He was familiar with the water between Pearl Harbor and Honolulu. Although he says he put off the tow for two days in order to get the favorable conditions which prevailed when it started, yet the wind was so strong during the afternoon the tow was attempted, according to Mr. Dunn, a disinterested witness, that the yacht he was sailing in close hauled near the tow carried her lee rail in the water, and there was "a heavy swell on, which would make a person not "used to going to sea good and seasick." Mr. Scott said, "The water was perfectly smooth, there was not even a swell." Mr. Wheeler said, "The water was smooth; of course there was a small "ocean swell," and admitted that there was enough motion to open up the seams that had become dried out above the water line, and, with the assistance of the water in the hull, to rock the house loose from the hull. The witness Strem said that the house was fastened to the hull with twenty-penny nails, and that the rocking of the house-boat loosened the fastenings of the house. These last three witnesses were introduced by the

defense, and were employees of the libelees at the time of the accident. With this evidence there is no doubt in my mind that there was a swell that made it obviously dangerous for the house-boat to go to sea.

The witness Dunn testified that from midnight to five o'clock A. M. was the best time for smooth water between Pearl Harbor and Honolulu under ordinary conditions. The witness Nielsen said: "When the trade winds settle down steady it always blows pretty strong in the afternoon until about sundown. * * * In southerly weather it is different." It was trade wind weather. The house part of the house-boat was a two-story structure, an edifice peculiarly unsuitable for being towed through a sea with such a swell as would cause it to roll to any appreciable extent. The witness Scott said: "I wouldn't have undertaken to tow her in such a swell." His evidence was, there was no swell. The sea was in such a condition as made it dangerous to take it to sea, as the result proved.

"There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." *The Steamer Webb*, 81 U. S. 414.

"If the state of the weather made the trip unsafe, it was respondent's duty to have waited for better weather." *The Mohler*, 88 U. S. 230; *Tucker vs. Gallagher et al.*, 122 Fed. Rep. 847.

That the inherent weakness of the house-boat was not such as to make it unsafe to take her to sea under any conditions is shown by the fact that she was towed from Honolulu to Pearl Harbor in the open sea by the libelees within a year before the accident.

The Temple Emery case cited above is instructive in relation to the questions raised in this. A firm hired a combined dredger and pile-driver and undertook to tow it in the open water of the lake to the place where it was to be used. The scow was 16 by 50 feet and 5 feet deep; at one end was the pile-driver, 40 feet high; the dredging appliances were at the other end and the boiler and engine amidships, making a craft as unsuitable for standing the motion caused by a considerable swell as the house-boat of this case. With this craft the tug-boat also took in tow 200 boom sticks. The Court found that the tow started without immediate necessity in unfavorable weather; that the tow line was attached to one corner of the scow only, when it should have been attached to both by means of a bridle to prevent yawing, and that the boom sticks endangered the tow by keeping it exposed to rough water longer than would have been the case if the scow had been towed alone. She capsized and the pile-driving and dredging attachments were lost. The Court, in holding the tug liable, said:

“The maritime skill and care thus called for is such as is reasonable in that service and under the conditions presented—such as may reasonably be demanded under ‘the peculiar circumstances and emergencies of the case.’” 122 Fed. Rep. 182.

This test of responsibility is recognized in the *Joseph Peene*, 130 Fed. Rep. 489.

The libellant claims a total loss and damages of twenty-five hundred dollars, that being the damages

agreed upon in the lease in case of a total loss. Counsel for the libelant have pressed this point under the rules of practice in maritime insurance. But it is doubtful if such rules can be applied to a case of this kind, and if they could, there has been no abandonment of what remained of the house-boat—a scow in good condition, an indispensable condition of recovery for total loss in insurance cases. The United States reports have some cases of collisions in which a tendency is shown to approximate to the rule in marine insurance. The *Falcon*, 86 U. S. 75, shows this tendency perhaps the most conspicuously, but the fact that the answer admitted a total loss appears to have had some influence in this decision.

The measure of damages in this case is the injury to the house-boat at the time of the accident. Mr. Hughes, who built her, says the scow cost seven hundred dollars, and that he would not undertake to put the house-boat back in her old condition as originally constructed, less the deterioration of the hull, for less than two thousand dollars. Mr. Almy says the original cost was about twenty-two hundred and fifty dollars, and fitting her up for libellees' use cost nearly three hundred dollars more, making a total of twenty-five hundred and fifty dollars. Why the superstructure should now cost two thousand dollars when it originally cost but fifteen hundred and fifty, or eighteen hundred and fifty with the additions made, the scow having cost seven hundred dollars, was not explained. No evidence has been introduced as to the deterioration of the house-boat, and yet there must

have been some. My estimate of the damages suffered by the libelant is eighteen hundred and fifty dollars, and a decree will be entered for that amount with costs.

SANFORD B. DOLE,

Judge, United States District Court.

Honolulu, September 15th, 1904.

[Endorsed]: Title of Court and Cause. Filed Sept. 15, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners, Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Decree.

At a special September Term of the District Court of the United States of America for the District of Hawaii, holden at the courtroom of the said court in the Judiciary Building, in the city of Honolulu, in said District, on Thursday, the 15th day of September, in the

year of our Lord one thousand nine hundred and four. Present: The Honorable Sanford B. Dole, District Judge.

And now, to wit, on this Thursday, the 15th day of September, A. D. 1904, this above-entitled cause having been heard on the pleadings and proof, and after briefs had been filed by the advocates of the respective parties and due deliberation being had thereon, the Court finds that the above-named libelant is entitled to recover therein, and the Court having found and assessed the amount of said libelant's damage and recovery herein at the sum of one thousand eight hundred and fifty (1,850) dollars in lawful money of the United States:

Now, therefore, on motion and application of J. J. Dunne, Esq., one of the proctors of the said libelant,

It is hereby ordered, adjudged and decreed that Mary K. Almy, the above-named libelant, have and recover of and from the above-named E. J. Cotton, J. B. Agassiz and E. C. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company, libelees, and that said E. J. Cotton, J. B. Agassiz and E. C. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company, said libelees, pay to Mary K. Almy, said libelant, the full sum of one thousand eight hundred and fifty (1,850) dollars in lawful money of the United States, together with costs and disbursements of said libelant in the above-entitled cause, hereafter to be taxed; to the rendition and entry of which said decree, said libelees now and here except.

Given, made and dated at Honolulu, Hawaii, this 15th day of September, A. D. 1904.

SANFORD B. DOLE,
Judge of the Above-named Court.

The above decree is hereby approved as to form.

ATKINSON,
JUDD,
MOTT SMITH,
R. W. BRECKONS,
Proctors for Said Libelees.

[Endorsed]: Title of Court and Cause. Entered in Judgment Book 1, at page 312 and filed Sept. 21, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ, and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY, Libelees.

Notice of Appeal.

To Mary K. Almy, Libelant, and J. J. Dunne, Esq., and
A. S. Humphreys, her Proctors:

You and each of you are hereby notified that the libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, intend to and hereby do appeal from the final order and decree of the District Court of the United States in and for the Territory of Hawaii, entered in the above-entitled cause on the 15th day of September, A. D. 1904, to the United States Circuit Court of Appeals for the Ninth Circuit; and you are further notified that the said libelees intend to introduce new proofs on appeal.

Done at Honolulu, T. H., September 23, 1904.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Libelees, E. J. Cotton, J. B. Agassiz and
C. E. Cotton, Doing Business Under the Firm Name
and Style of Cotton Brothers and Company.

Received a copy this 23d day of September, 1904.

J. J. DUNNE,

A. S. HUMPHREYS,

Proctors for Libellant.

[Endorsed]: Title of Court and Cause. Filed Sep-
tember 23, 1904. W. B. Maling, Clerk. By F. L. Hatch,
Deputy Clerk.

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*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libellant,

vs.

E. J. COTTON, J. B. AGASSIZ, and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS &
COMPANY,

Libelees.

Petition for Allowance of Appeal.

To the Honorable SANFORD B. DOLE, Judge of the
District Court of the United States, in and for the
Territory of Hawaii:

The libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered in the above-entitled cause on the 15th day of September, A. D. 1904, do hereby appeal from the said order and decree, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed with the clerk of the District Court of the United States in and for the Territory of Hawaii, their notice of appeal, pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon the said order and decree as made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order may be made fixing the amount of security which the libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, should give and furnish upon such appeal, and upon the giving of such security all further proceedings in this court be superseded and stayed until the determination of the said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 23, A. D. 1904.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Libelees, E. J. Cotton, J. B. Agassiz and
C. E. Cotton, Copartners Doing Business Under the
Firm Name and Style of Cotton Brothers & Co.

Service of a copy of the above petition, for allowance of appeal acknowledged this 23d day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 23, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Order Allowing Appeal.

Upon motion of Albert F. Judd, Esq., and R. W. Breckons, Esq., proctors for libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers &

Company, libelees in the above-entitled cause, and on filing petition of the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees as aforesaid, for order allowing appeal, together with an assignment of errors:

It is hereby ordered that an appeal be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in the above-entitled cause on the 15th day of September, A. D. 1904, that the amount of the bond on said appeal be and hereby is fixed at the sum of three thousand (3,000) dollars; and that a certified copy of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated the 24th day of September, A. D. 1904.

SANFORD B. DOLÉ,

Judge of the District Court of the United States in and for the Territory of Hawaii.

Received a copy this 24th day of September, A. D. 1904.

J. J. DUNNE,

A. S. HUMPHREYS,

Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Assignment of Errors.

Now comes E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, and say that in the record and proceedings in the above-entitled matter there is manifest error, and said appellants herein now make, file and present the following assignment of errors, upon which they will rely as follows, to wit:

1. That said Court erred in said cause in holding and deciding that the lease of the house-boat did not contain a provision requiring her to be returned to her owner at Pearl Harbor at the termination of the lease.

2. The Court erred in holding and deciding that the capsizing of the house-boat in question was caused by the swell of the sea.

3. The Court erred in holding and deciding that the house-boat in question had open air-courses.

4. The Court erred in holding and deciding that the house-boat was in the possession of the libelees under the terms of the lease, after July 29, 1903.

5. The Court erred in holding and determining that the accident was not unavoidable.

6. The Court erred in holding and determining that the libelees failed to exercise the care and caution which the occasion required, and that the loss of the house-boat was due to such failure.

7. The Court erred in holding and determining that there was a swell which made it obviously dangerous for the house-boat to go to sea.

8. The Court erred in holding and determining that the witness Scott testified that "I would not have undertaken to tow her in such a swell," and in deciding said cause on the theory that the witness had so testified.

9. Said Court erred in holding and deciding that the libelant was entitled to recover damages from the libelees.

10. Said Court erred in making, rendering and entering its decree on the 15th day of September, A. D. 1904, that the libelant recover of the libelees damages in the sum of \$1,850.00, with costs of suit.

11. Said Court erred in making, rendering and entering its decree in said cause, because its said decree is contrary to law, and to the facts as set forth in the pleadings and records in said cause.

12. Said Court erred in not making, rendering and

entering a final decree in said cause in favor of the libelees.

In order that the foregoing assignment of errors may be and appear of record, said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, file and present the same to said Court, and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such case made and provided, and said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, pray a reversal of the above-mentioned decree heretofore made and entered by said Court.

Dated Honolulu, September 23d, A. D. 1904.

E. J. COTTON,

J. B. AGASSIZ and

C. E. COTTON,

Copartners Doing Business Under the Firm Name and
Style of Cotton Brothers and Company.

By their Proctors,

ALBERT F. JUDD.

R. W. BRECKONS.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Appellants.

Due service of the within assignment of errors is hereby admitted and receipt of a copy thereof acknowledged this 23d day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 23, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Bond for Costs on Appeal.

Know all men by these presents, that we, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, in the above-entitled cause, as principal, and Pacific Surety Co. as sureties, are held

and firmly bound unto Mary K. Almy, libelant in the above-entitled cause, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said Mary K. Almy, her attorneys, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the 26th day of September, A. D. 1904.

Whereas, lately, to wit, on the 15th day of September, A. D. 1904, in a suit depending in the District Court of the United States, in and for the Territory of Hawaii, between Mary K. Almy, libelant, and E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, a decree was rendered against the libelees, and the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, having obtained from said Court an order allowing an appeal to reverse the decree rendered in the aforesaid cause, and a citation directed to the said Mary K. Almy, libelant, is about to be issued, citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 26th day of October next.

Now, the condition of the above obligation is such that if the said libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name

and style of Cotton Brothers and Company, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their appeal good, then the above obligation shall be void; otherwise, the same shall remain in full force and effect.

E. J. COTTON,
J. B. AGASSIZ and
C. E. COTTON,
Copartners,

By their Attorney in Fact, A. S. CANTIN.

[Corporate Seal] PACIFIC SURETY COMPANY.

By ZENO K. MYERS,
Atty. in Fact.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

United States of America, }
Territory of Hawaii. } ss.

_____ and _____, being duly sworn, deposes and says, each for himself, that he is a resident and freeholder in said Territory; that he is worth the sum of three thousand (3,000) dollars over and above all his just debts and liabilities; and that his property is situate in said Territory, and subject to execution.

Subscribed and sworn to before me this —— day of
September, A. D. 1904.

The within bond is approved as to form, amount and
sufficiency of sureties, as of September 26, 1904.

SANFORD B. DOLE,
Judge U. S. District Court.

Due service of the within bond on appeal is hereby
admitted and a receipt of a copy thereof acknowledged
this 26th day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Mary K. Almy, Libelant.

[Endorsed]: Title of Court and Cause. Filed Septem-
ber 26, 1904. W. B. Maling, Clerk. By F. L. Hatch,
Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Bond on Appeal.

Know all men by these presents, that we, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, as principals, and Pacific Surety Co., as sureties, are held and firmly bound unto Mary K. Almy, libelant in the above-entitled cause, in the full and just sum of three thousand (3,000) dollars, to be paid to the said Mary K. Almy, her attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of September, A. D. 1904.

Whereas, lately, to wit, on the 15th day of September, A. D. 1904, in a suit depending in the District Court of the United States in and for the Territory of Hawaii, between Mary K. Almy, libelant, and E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, a decree was rendered against the libelees and the said libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, having obtained from said Court an order allowing an appeal, to reverse the decree entered in the aforesaid cause, and a citation directed to the said Mary K. Almy, libelant, is about to be issued, citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 26th day of October next.

Now, the condition of the above obligation is such that, if the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, shall prosecute their appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, or on the mandate of said United States Circuit Court of Appeals by the Court below, then the obli-

gation shall be void; otherwise the same shall remain in full force and effect.

E. J. COTTON,
JAS. B. AGASSIZ and
C. E. COTTON,
Copartners.

By Their Attorney in Fact,
A. S. CANTIN.

[Corporate Seal] PACIFIC SURETY COMPANY.

By ZENO K. MYERS,
Attorney in Fact.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

United States of America, }
Territory of Hawaii. }

_____ and _____, being duly sworn, deposes and says each for himself that he is a resident freeholder in said Territory; that he is worth the sum of two hundred and fifty (250) dollars over and above all his just debts and liabilities; and that his property is situate in said Territory, and subject to execution.

Subscribed and sworn to before me this _____ day of September, A. D. 1904.

The within bond is approved as to form, amount and sufficiency of sureties.

Dated September 26th, 1904.

SANFORD B. DOLE,
Judge U. S. District Court.

[Endorsed]: Title of Court and Cause. Filed September 26, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

Clerk's Certificate to Transcript.

United States of America, }
Territory of Hawaii. } ss.

I, Walter B. Maling, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 140, inclusive, is a true and complete transcript of the record and proceedings had in said court in the case of Mary K. Almy vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$55.90, and that said amount was paid by appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 17th day of October, A. D. 1904.

[Seal]

WALTER B. MALING,
Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Citation.

United States of America, }
District of Hawaii. } ss.

The President of the United States, to Mary K. Almy, Libelant Above Named, and to J. J. Dunne and A. S. Humphreys, her Proctors, Greeting:

You and each of you are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San

Francisco, in the State of California, on the 26th day of October, A. D. 1904, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Territory and District of Hawaii, in the above-entitled proceeding, wherein E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, are libelees, and you are libelant, to show cause, if any there be, why the decree entered in the above-entitled proceedings on the 15th day of September, A. D. 1904, in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and speedy justice should not be done in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of September, A. D. 1904.

SANFORD B. DOLE,
United States District Judge Presiding in the Above-entitled Court.

[Seal] Attest: WALTER B. MALING,
Clerk.

By Frank L. Hatch,
Deputy Clerk.

Due service of the within citation is hereby admitted and receipt of a copy thereof acknowledged this 26th day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Mary K. Almy, Libelant.

[Endorsed]: 39. United States District Court, District of Hawaii. Mary K. Almy vs. Cotton Brothers and Company. Citation. Filed Sept. 26th, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

[Endorsed]: No. 1171. United States Circuit Court of Appeals for the Ninth Circuit. E. J. Cotton, J. B. Agassiz and C. E. Cotton, Copartners Doing Business under the Firm Name and Style of Cotton Brothers and Company, Appellants, vs. Mary K. Almy, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Hawaii.

Filed February 17, 1905.

F. D. MONCKTON,
Clerk.

Libelant's Exhibit No. 1.

Lease.

This indenture of lease made this first day of January, A. D. 1903, by and between Mary K. Almy of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated as the Lessor of the first part and Cotton Brothers and Company, a firm doing business at Honolulu aforesaid, hereinafter designated as the Lessees of the second part.

Witnesseth: That said Lessor, for and in consideration of the agreements and covenants on the part of said Lessees hereinbelow mentioned does hereby demise and



U. S. District Court, Hawaii. Amy vs. Cotton Bros.
Libelant's Exhibit No. 2. Filed May 23, 1904. W. B.
Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth
Circuit. Libelant's Exhibit No. 2. Received Oct. 27,
1904. F. D. Monckton, Clerk. By Meredith Sawyer,
Deputy Clerk.

Libelant's Exhibit No. 3.

Honolulu, T. H., August 5th, 1903.

Mrs. Mary K. Almy, Honolulu.

Dear Madam: We beg to inform you that your house-boat, which at the request of Mr. Almy in your behalf we undertook to tow without compensation from Pearl Harbor to Honolulu, suddenly filled with water and careened over on its side without warning on the way up.

We anchored the boat, which was still afloat, and as soon as possible towed the submerged scow into Honolulu harbor. The house on the scow is demolished and we have saved as much of the structure as we could and the scow and everything rescued is now at the end of the Mauka Bishop Estate Wharf. We have a man in charge, but must decline to take responsibility for the boat which is now subject to your direction.

We remain,

Very truly yours,

COTTON BROS. & CO.,

Per A. S. CANTIN,

U. S. Dist. Court, Hawaii. *Almy vs. Cotton Bros.*
Filed May 24, 1904. W. B. Maling, Clerk. By F. L.
Hatch, Deputy. Libelant's Ex. 3.

No. 1171. U. S. Circuit Court of Appeals, for the
Ninth Circuit. Libelant's Exhibit 3. Received Oct. 27,
1904. F. D. Monckton, Clerk. By Meredith Sawyer,
Deputy Clerk.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelees' Exhibit "A." Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "B."

Honolulu, June 7th, 1903.

Mess. Cotton Bros. & Co., Boston Bldg., Honolulu.

Gentlemen: In order that I may make my plans for the summer, will you kindly inform me if you intend to keep the house-boat after July 1st and, if so, how long you will probably need possession.

Yours truly,

MARY K. ALMY.

U. S. Dist. Court, Hawaii. Almy vs. Cotton Bros., Libelees' Ex. "B." Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libelees' Exhibit "B." Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "C."

Honolulu, July 29th, 1903.

Mers. Cotton Bros. & Co., Honolulu.

Gentlemen: Will you please notify me on what day you intend to bring the House-Boat up to Honolulu, in

order that I may have some one at the R. R. Wharf to receive her.

Yours truly,

MARY K. ALMY.

U. S. Dist. Ct., Hawaii. *Almy vs. Cotton Bros. Libelees' Ex. "C."* Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. *Libelees' Exhibit "C."* Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "D."

[Letterhead of Cotton Bros. & Co.]

Honolulu, H. I., June 9th, /03.

Mrs. M. K. Almy, Honolulu, H. T.

Madam: In answer to your favor of the 7th inst. would say that we will probably need the house-boat until the 1st of August.

Yours truly,

COTTON BROS. & CO.,

Per C.

U. S. Dist. Ct., Hawaii. *Almy vs. Cotton Bros. Libelees' Ex. "D."* Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. *Libelees' Exhibit "D."* Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

